A

TREATISE

OF THE

RELATIVE RIGHTS AND DUTIES

OF

BELLIGERENT AND NEUTRAL POWERS

IN

MARITIME AFFAIRS:

IN WHICH THE

PRINCIPLES OF ARMED NEUTRALITIES AND THE OPINIONS OF HUBNER AND SCHLEGEL ARE FULLY DISCUSSED.

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AND AN APPENDIX.

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PREFACE.

MR. WARD'S* Treatise on Maritime Law—a work which, according to Kent, has "exhausted all the law and learning applicable to the question"†—is now reprinted because it is entirely forgotten and unknown; having disappeared within late years from those libraries where it is known to have existed. This disappearance is so singular that it might be more exact to say that it has been removed by careful management. At any rate, such disappearance has been coincident with the renewal of those attempts to put down Maritime power which began towards the close of the last century, and then ended in failure. It was to be found in the British Museum, where the title may still be seen in the catalogue, with the stroke of a pen drawn through it. It was in Hookham's library, among the very complete set of pamphlets which rendered that old collection so valuable; but this Treatise of Ward's had disappeared from it before the period of the Crimean War. That copy had a peculiar interest; for through its perusal the attention of one Englishman, whilst still a youth,‡ was awakened to the subject of Maritime Law, and its connexion with Naval power: and it is to the labours of the same individual, that must be attributed the change from ignorance and

* Mr. Ward was the father of the late Sir Henry Ward.
† Kent's Commentaries, vol. i. p. 128. ‡ Mr. David Urquhart.

indifference

indifference in those matters, to anxiety and intelligence, which have lately been displayed both in England and in France. The public attention is now awakened to the peril to which these two countries are exposed by the Declaration of Paris against Privateering and the Right of Search. To those who are struggling to restore the power of England and to combat the prejudices raised against Privateering, this Treatise is now offered as being peculiarly appropriate to meet the fallacies they have to encounter. It is to be observed that it is not written without a definite purpose, but is the answer, and at the time the most authoritative one, to the arguments put forward by the projectors of the Armed Neutrality. It is still more remarkable, as we learn from the preface, that a Commission was appointed by the Government of that time to report upon the subject, and Mr. Ward was a member of that Commission. The Ministers who resisted the Armed Neutrality, and who, by doing so, raised England to the height of her fame and power, were therefore as anxious to conform their conduct to the Law of Nations as to provide for the safety of their country.

Mr. Edmund Phipps, in a memoir on Mr. Ward, says that this Treatise was written at the solicitation of Lord Grenville, and that it was on the eve of completion when a change took place in the Ministry (1801). In the meantime, so great had been the pressure on the author to get at least a portion of his

his arguments on the great question of Armed Neutrality before the public, that he determined to publish the first part before the rest, leaving the whole subject to be completed in an after publication. The part now extant was accordingly published in 1801. When it came out, he received the following letter from Lord Grenville :—

"*Dropmore*, April 2, 1801.

"DEAR SIR,

"I waited only till the circuit was over (not knowing where to direct you) to express how much I have been gratified by the manner in which you have executed the work which you had the goodness to undertake at my suggestion. I knew before that it could not be in any hands more able to do justice to the subject, and I can with great sincerity assure you that my expectations have been fully justified by the result. I earnestly hope that you will have time and leisure to complete it, though I should be very sorry if you had delayed the publication of this part, which in the present moment is the most important."

As far as can at present be ascertained, Mr. Ward never completed the rest of his work: though he continued it so far, and so far only, as to deal with one of the propositions he proposed to discuss; namely, "that contraband is confined to articles of exclusive and immediate service in war."

But if in 1801 it were desirable to meet the proceedings of England's enemies by an exposition of the Law, how much more is it so now, when their tactics are so far changed that instead of forming a league against England, and thus attempting to gain their point by open violence, all their care is directed to induce England herself to put forward the new doctrines as something beneficial to herself as well as to mankind? The success that has already attended their

efforts, is certainly negatively due to the entire ignorance that came to prevail on the subject of Maritime Law, and the almost universal blindness that existed at the time of the Crimean War on the connexion between it and naval power. Had it been otherwise, never would the country have been induced, whilst going to war with Russia, at the same time to resign the very means by which England could act against her and coerce her.

The signing of the Declaration of Paris was a mere corollary of the act by which the principles embodied in it were announced at the opening of the war. But that the country should have submitted to it is a still further proof of the change that had taken place during the interval of peace since 1814. For it was the resignation of the means that had made England great and powerful, at the moment of terminating a war, the course of which afforded ample proof, if such were needed, that those means were necessary to England as a naval Power, as it showed that the finest navy becomes almost useless when cruisers are given up and neutrals are suffered to carry on the commerce of the belligerents.

The prejudice against privateers arises partly from ignorance of the safeguards provided by the Law for the protection of vessels which are not lawful prize, and partly from the writings of officers of Royal Navies who have been unconsciously biassed by a prejudice similar to that which is felt by regimental officers against

against militiamen, volunteers, and irregular troops. The following is a passage taken at random, which may serve as a specimen of this kind of writing:

"There is but a slight step from the privateersman to the pirate; both fight for the love of plunder; only that the latter is the bravest, as he dares both the enemy and the gallows."

It was only after such sentences had been written, and the nation prepared by a course of such romance reading, that Lord Aberdeen told the people of Aberdeen that privateering was the last shred of barbarism, and that the only difference between a pirate and a privateer was that the latter bore the Queen's Commission. A similar comparison might be made between brigands and soldiers. If the subject had been studied in law books and not in novels, Lord Clarendon could not have based his attempted defence of the Declaration of Paris on the proposition that England obtained a valuable consideration for the acknowledged loss incurred by the giving up of her right to seize enemies' property in neutral vessels, by the abolition of privateering!

The paragraph from a novel above quoted is followed by another, which shows how the false notions generally entertained on the subject of privateers, have been fostered by confounding the deeds done in former times with those done in the days of our grandfathers: "But in whatever school they had been taught, the Buccaneers who kept about the English colonies were

daring fellows, and made sad work in times of peace among the Spanish settlements and Spanish merchantmen."*

Now the writer of this passage is speaking of Captain Kidd in the reign of Charles II., who ended his career as a pirate, for which he was tried and hung. At that time, as may be seen from the memoirs of Viscount Forbin, and other narratives, war between England and France, and between England and Spain, was chronic in certain latitudes, and was not interrupted by the fact of those countries being at peace in Europe. Moreover, from the time of Drake, whatever could be alleged against privateers could with equal truth be alleged against the captains of the Royal Navy; but in process of time the conduct of Maritime war improved and became milder and more regular on the part both of the Royal Navy and of the privateers, though it may be doubted whether the theatre of the "Thirty Years War" had any cause to envy the districts of France lately occupied by the Prussians. Maritime war must always be less inhuman than war on land, for seamen do not go into action in the state of hardship and privation which goads the soldier to excess; and when the action is over there are no women and children to suffer from the passions excited by the strife.

STANLEY.

October 4, 1874.

* Tales of a Traveller, by Geoffrey Crayon (Washington Irving), vol. ii. p. 241.

INTRODUCTION

BY THE AUTHOR.

IT is now more than two centuries since the nations of Europe began to recover themselves from the gross and brutal maxims which formerly governed and disgraced them. While the whole world was in arms, and the wild burst of ferocious and unreflecting courage destroyed all before it, and despised or oppressed the milder arts of peace, it availed little, that some few were to be found more enlightened than the rest, who endeavoured to prove that there were rules of duty beyond the mere force of power. For, while the cloistered learning of the times was confined to the humble range of manuscript communication, and religion, the only bond, or at least the truest sanction of our duties, had maddened into enthusiasm or evaporated in superstition, there was little room to expect improvement from the only sources whence improvement can arise. Accordingly, the potentates of the earth far from profiting by their intercourse with one another, were the slaves alternately of vengeance, avarice, or ambition;

ambition: and the right of the strongest, so far from being disguised as a principle, was almost the only principle professed.

The Reformation, however, and the natural tendency to improvement, brought men at length to truer maxims; and the art of printing, by facilitating the means of real knowledge, achieved almost a new order of things. Then began the States of the world to embrace more just conceptions of the nature of their reciprocal duties, and to enquire, even with anxiety, whether there was not some high obligation, some settled principles of action, founded in a nobler origin than the brutal impulses of passion or interest which had hitherto governed them. Religion, learning, and philosophy, all combined, under the auspices and direction of an illustrious set of men, to teach nations, as they had before taught individuals, that they were to be governed by a scheme of morals founded in the obligations of justice, and sanctified by the revealed commands of their Maker. Amongst these, Grotius led the way, and rose to so proud a height of eminence, as to leave all rivals far behind him. The rules for action which he laid down were so clear and precise, so deeply founded, upon such firm and sound bottom, and so applicable, besides, to almost all the cases which human ingenuity could imagine, or human vicissitudes supply, that, with a very few exceptions indeed, there is scarcely a position of his which can be combated

combated with success, much less overthrown. At the same time he was so ably seconded and illustrated by his successors in his noble science, during the whole of the seventeenth century, and almost during the whole of the last, that one would think the Law of Nations would now be well understood in all its points and bearings, and that it had gradually risen to that height of perfection which other sciences have acquired. Much, however, it seems, remains to be done.

It has been well observed, that States are moral agents as well as men; for they are composed of men, have the same passions and temptations to do ill, together with the same reason and antidotes to temptation. They owe also the same obedience to the Creator and Governor of all things, can pretend to nothing, and ought to yield every thing, as they suppose he would rule and exact it from a simple individual. But, unhappily for mankind, from the varying powers of their understandings, the influence of prejudice, the clashing of interest, and, above all, from the want of some sovereign and all-powerful tribunal to pronounce with authority, and execute with effect, it is no easy thing to establish a common code of laws which all may consult, and to which all should defer. In the war for the Austrian succession, a *philosophic* king of Prussia chose to attempt an alteration in the neutral code, not by endeavouring, as nations more interested than his had done,

done,* to obtain it by boon and express stipulations from Great Britain, but by claiming a right, founded on reasoning, such as it was, to carry enemy's property in his ships free from search; a claim which fell still-born to the ground, from the irresistible argument which stifled it in its birth.†

The close of the eighteenth century, however, has exhibited a contest upon the same point of law, and founded in the same *philosophy*, of such extreme magnitude in its consequences, agitated in a manner so tremendous for the parties, and likely to bring along with it such a train of evils, ending in misery and blood, that all men must naturally make it an anxious subject of their investigation, and be eager to inquire into the reasoning and authorities that can settle it, if indeed it can now be granted to us, that reasoning and authority can settle it at all.

The pretensions and principles of what is now well known by the name of the "*Armed Neutrality*," have been formed for some years. Whether they have been formed upon a just foundation, or a foundation any thing

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* Holland, for instance, who laboured it under the direction of their ablest ministers,„ after their war with Cromwell, till it ended in the treaty of 1674. See Thurloe, *passim*; De Witt and Boreel's Letters, and Temple.

† See the Duke of Newcastle's Letter, &c. &c.

like

like just ; whether they can bottom themselves in any *well reasoned* theory, or find support from any *examples*, (and without a *well reasoned* theory, supported by the force of *example*, it is in vain that you look for the Law of Nations, or any other law,) is the momentous object of the following enquiry. If the pretensions of the North can be made out convincingly, if even, *incerto marte*, their favourers can discuss the question, the world will pause before they fly to the terrible decision of arms. If, however, the whole should be usurpation, set up to acquire unlawful advantages to them, and ending in the total deprivation of the lawful means of defence to us, it then becomes that object for which the nation must contend to the end of her resources, or cease to be a nation that has any resources at all. Mankind will allow, that the subject is full of interest ; and the crisis of the times is such, that Britons at least, if not the Dane and the Swede, will give it all their anxious attention.

In that well-known crisis of the American war, when the whole exertion of France was pointed to the acquisition of a navy able to cope with us singly, without which it had become an axiom of their Government, that they could not pretend to give law to the world ; their policy was, as it will always be with the inferior Belligerent at sea, to turn the whole of their marine resource

resource into the means of offence; leaving their trade, and the supply of stores, for a time, to the protection of Neutrals, if any Neutrals can be hardy enough to risk the consequences of an interference. The Dutch, corrupted to the core by the love of gain, which had often made them supply their own enemies with the means of annoyance,* had always risked, and always suffered for it. Denmark and Sweden, as bold in spirit, but not so vitiated by the corruptions which the mere unqualified genius of trade must ever generate, had shown much disposition to interfere; but either checked by a sense of justice, or tempering their disposition with prudence, they had never ventured into an open defiance of the existing law, nor upon the bold assertion of a new one, which no nation in Europe had yet admitted. It was reserved for the aspiring power of Russia alone to lead the way to an innovation, which, whether, as she asserted, it was *a natural system, founded on justice*, re-

* As at Bergen-op-Zoom, which Lowendahl himself confessed he could not have taken for want of ammunition, had not the enemy been so good as to supply him. Many defend the Dutch for this in point of policy, without observing that it can only not tend to ruin, when the Power that sells is so superior to that which buys, that it may laugh at its thus *assisted* efforts. This could never happen from the Dutch towards the French, who have so often endangered their very existence. Who that was to fight with his superior in strength and skill, would lend him the sword that was to work his destruction? Reverse the situation, and the case is perhaps possible.

mains

mains now to be seen, but which her own Minister, in his memorial to the States General, allows, '*was to be* '*established and legalized in their favour.*'

That memorial stated in terms, that the same invitation had been made to the courts of Copenhagen, Stockholm, and Lisbon, '*in order, that by the united endeavours* '*of all the neutral maritime Powers, a neutral system,* '*founded on justice, might be established and legalized in* '*favour of the trade of neutral nations which by its real* '*advantages might serve for a rule for future ages.*'*

What real advantages are here spoken of, except those accruing to the neutral and inferior Belligerent alone, it will not be easy to determine; it is certain that no advantage at all, specious or real, could arise to him who had overcome, or nearly overcome, his enemy at sea; and as certain that the system, though claimed to be natural, was yet *to be* established and legalized, and consequently, by an implication as powerful as inevitable, had never *yet* been established or legalized.

Now what was this system founded in Nature, but which for many hundred years the searchers into natural

* See the Memorial of Prince Gallitzin to the States General, April 3, 1780.

right

right had never thought of establishing as law? It consisted of four grand articles.

First. 'That all neutral ships may freely navi-
'gate from port to port, and on the coasts of
'nations at war.

Secondly. 'That the effects belonging to the
'subjects of the said warring Powers shall be
'free in all neutral vessels, except contraband
'merchandise.

Thirdly. 'That to determine what is meant by a
'blocked-up port, this is only to be understood
'of one which is so well kept in by the ships of
'the Power that attacks it, and which keep
'their places, that it is dangerous to enter into
'it.

Fourthly. 'That neutral vessels shall not be
'stopped, except for just cause, and upon clear
'evidence; that judgment shall be given without
'delay; that the process shall always be uniform,
'prompt and legal; and that besides damages
'to those who have sustained loss, ample satis-
'faction shall be made for the insult done to the
'flag of the contracting Powers.'*

* See the Treaties between Russia and Denmark, and Russia and Sweden, June 1780.—Marten's Treat. tom. ii.

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This was the claim in 1780. This is the claim, as far at least as Denmark has declared itself, in 1800.* This also, together with another, the privilege of the flag, are the claims both of Denmark and Sweden. Russia, in addition to other supposed and particular injuries, co-operates, or rather leads the way, to the assertion of these claims, *which all say are in their nature indissoluble*; † and for this the whole North are in arms! Pressed, therefore, as we are in this gigantic contest, in addition to the now undivided weight of our most powerful and bitter enemy, in the most just war that was ever undertaken; I have thought that it would be no unacceptable service to my countrymen—perhaps no unacceptable service to our confederated enemies themselves, if the whole question could be laid at once before them, with all its train of authorities and cases, in as much brevity as is consistent with the subject.

With respect to the fourth article of the Russian Treaties, 1780, it will not be at all necessary to discuss it; as there is nothing in it that militates against justice: only we may observe, that when costs and damages are

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* See Count Bernstorff's answer to Mr. Drummond's note, December 1800.

† See the Preamble to the Treaty 4th (16th) December 1800, between Russia and Sweden, which is 'made in order to give a *new sanction* 'to those principles of their neutrality which are in their nature indis-'soluble.'

awarded

awarded, satisfaction for the whole injury, both to the individual and the flag, is intended to be made. As to the third, it seems nearly correct as a general rule. Where it is not entirely so, the enlightened understanding, and admirably consistent decisions of a man whom I should exalt myself by endeavouring to praise, must satisfy even the framers of the Armed Neutrality themselves upon the subject.*

In addition however, to the important, and to us fatal claims set up in the three first articles, there are a variety of others regarding the rights of search, detention, and judicature, interwoven with them so intimately as to make it impossible to separate them in a treatise like this. These have found of late most strenuous advocates in many of the public men of the times; the high-toned and certainly able Ministers of the courts in question; and civilians and professors of public law, whose works, though I mean the reverse of shewing them disrespect, have produced no sort of conviction in my mind. And I cannot help thinking they have owed the reputation they enjoy on the continent, more to the flattering unction which they give to very favoured

* See a variety of cases of blockade; and Sir William Scott's Judgments, in Dr. Robinson's Admiralty Reports. The rule of decision there, is, that there must be an actual blockade, together with notice of it to the party, or to those whose duty it was to inform him, and an attempt at its violation.

positions,

positions, than to the skilful management of the argument, or the soundness of the deduction. Amongst these, *Hubner*, who wrote in the war of fifty-six ;* and *Schlegel*, who has lately detailed, with augmented sophistry, (if I may use such an expression) the arguments of his precursor, have been too much boasted of, not to merit a considerable portion of notice ; but *Sir William Scott* must forgive me the presumption of attempting, after him, to handle an argument which he, from his high place, has given to the world, but which I must necessarily touch upon in reviewing those who think they have reviewed him.†

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* De la Saisie des Batimens Neutres, &c.—He was a Danish civilian, and Conseiller de Conférence.

† I allude to professor Schlegel's Treatise, Sur la Visite des Vaisseaux Neutres *sous Convoi*, ou Examen impartial du Jugement prononcé par le Tribunal de l'Amirauté Angloise, 1799, &c.

A TREATISE,

TREATISE, &c.

THE alleged rights of Neutrals in maritime affairs, which I propose to examine, may be divided into several propositions, or general heads.

I. That free ships make free goods; from which a corollary is derived, that Neutrals have a right to coast from port to port, and to trade from colony to colony, and from the colonies to the mother country of Belligerents, without being liable to search or detention, except for contraband of war.

II. That contraband is confined to articles of exclusive and immediate service in war.

III. That war means military war and commercial peace; that is, that no private property can be the subject of prize.

IV. That the courts of the capturing Belligerent are not competent to entertain questions concerning Neutrals captured or detained upon the high seas.

V. That the right of search is not a natural right, and is confined absolutely to the mere inspection of papers.

VI. That the flag of the State is tantamount to all documentary parol and ocular evidence, and excludes all right of search whatever.

VII. That whatsoever is done under cover of the flag, immediately excludes the supposed jurisdiction of the courts of prize, and becomes matter of representation between State and State.

PROPOSITION I.

THAT, BY THE LAW OF NATURE, FREE SHIPS MAKE FREE GOODS, AND NEUTRALS HAVE A RIGHT TO COAST FROM PORT TO PORT, AND TO TRADE FROM COLONY TO COLONY, AND FROM THE COLONIES TO THE MOTHER COUNTRY OF BELLIGERENTS, WITHOUT BEING LIABLE TO SEARCH OR DETENTION EXCEPT FOR CONTRABAND OF WAR.

THE argument on either side of this question proceeds preliminarily upon the supposition, that this is or is not the *genuine*, *natural*, and *primitive* law, distinct from all limitation by treaty, and wholly unmodified by convention.* In this state of things, the Belligerent is supposed to say that he has a right to annoy his enemy by every means in his power, and consequently to seize his property wherever he may find it, even on board the ships of a friend. On the other hand, the Neutral contends, with equal earnestness and equal appearance of reason, as a general doctrine, that he has a right to carry on his trade with either and both the Belligerents; that their quarrel ought not to affect him; and that every attempt to trench upon that right is an invasion of his neutrality. Here, then, is an apparent confliction of two apparently equally perfect rights, and how to reconcile them is the difficulty to be unravelled. If good faith,

* Schlegel, *passim*. — See also the third article of the late treaty, $\frac{4}{16}$ December, 1800, between Russia and Sweden. 'And whereas it is 'resolved, that whatever, by virtue of the foregoing article, can be deemed 'contraband shall be excluded from the commerce of Neutral Nations: in 'like manner, his Majesty the King of Sweden, and his Imperial Majesty 'of all the Russias, will and determine that all other merchandise shall 'be and remain free.—*And in order that the general principles of the Law 'of Nature, of which the freedom of Trade and Navigation, as well as the 'rights of Neutral Nations, are the immediate consequence*, may be placed 'under a competent and sure safeguard, they have resolved no longer to 'delay that voluntary explanation, from which they have hitherto been 'restrained by motives of their separate and temporary interests,' &c. &c.

however,

however, be brought into the enquiry, that firmest and best auxiliary to every serious investigation, but little of intellect will, perhaps, be necessary to settle the point.

For the more convenient discussion of the subject, the argument may be divided into three parts, or sections. First, as to the reasoning drawn from mere common sense and the principles of general equity: Secondly, as to the reasoning drawn from authority and custom: Thirdly, as it may be collected from treaties.

SECTION FIRST.

THE whole mystery of this question, as far as I have been able to judge, proceeds from either a wilful or an ignorant misrepresentation, on the part of the neutral champions, *of the real pretensions of the Belligerent*, which, they suppose, amounts to an entire interdiction of the fair rights of commerce *which they enjoyed before the war.* All the argument, and the declamation that accompanies the argument; the attempts at new theories, set off with the arrangement and forms of system and science; the unfounded and most easily refuted accusations brought against us, from scantlings of our history, or crude and mistaken, if not wilfully misrepresented, accounts of our judicial proceedings; —all this, I say, turns upon this radical mistake, that we wish to prevent and cut off the whole trade of Neutral Powers, or at least make such inroads into it, beyond the mere deprivation of contraband, as shall render it nugatory, *even when carried on for their own account.* Once, and once only, for the space of near two centuries, such an attempt was made, and, I freely own, by this country, in conjunction with Holland, when, in the treaty of Whitehall,* they

 endeavoured

* Aug. 12, 1689. By the second article it is stated, that as several Kings, Princes, and States in Europe, are already engaged in a war against the most Christian King; and that they have already

endeavoured to prevent all commerce whatsoever with France in the war of 1689. But though there was, perhaps, power sufficient, had we ever been solemnly disposed to consider that power is right, as many sour spirits have most foolishly imputed to us; yet we saw the injustice into which we had been surprised, and, to use the language of Vattel, (blaming us on this very question) 'Les deux puissances 'maritimes, reconnoissant que les plaintes des deux couron-'nes* étoient bien fondées, leur firent justice.'†

With this one exception, Great Britain has never attempted, since the law began to be settled, after the frequent altercations upon it in the sixteenth century, to impose fetters upon that part of neutral commerce which is *innoxious*, and which had in reality existed before a state of warfare, unless in the *authorized* cases of contraband, and of carrying enemy's property. Let it be remembered, therefore, that the question on the part of the Belligerent is not, as has grossly been supposed, whether he has a right to interfere with the Neutral; but merely whether he cannot prevent the Neutral from interfering with him? In other words, whether, when the former *extends* the bounds of his trade, not *with*, but *for* a Belligerent; not only purchases what is wanting for his own consumption, or sells his usual peace-supply of articles; but sells to him articles which may be

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ready prohibited, or will in a short time prohibit all commerce with France, 'it is agreed between his said Majesty of Great Britain and the said Lords of the States General, that if, during the course of this war, the subjects of any other King, Prince, or State, shall undertake to traffic, or have any commerce with the subjects of the most Christian King; or if their vessels or shipping are met with in their passage to the ports, havens, or roads, under the obedience of the most Christian King; the said vessels, shipping, merchandises, or wares, shall, in the case above-mentioned, be attacked and taken by the Captains of men of war, privateers, or other subjects of the King of Great Britain and the Lords of the States General, and shall, before proper judges, be condemned for lawful prize.'

* Denmark and Sweden. † Droit des Gens, l. iii. sec. 112.

easily

easily converted into the means of annoyance; or even *turns carrier* for his oppressed friend, who uses the surplus strength which is thus afforded him against his opponent; whether, in such case, the other Belligerent has no reason to be offended, and to rèclaim those rights which the pretended Neutral is disposed to deny him.

This, in fact, is the true state of the question; and with this magnet to guide our wanderings, this towering landmark to point our exertions, we shall be able, I think, to weather the tempest which has been only brewed by ingenious sophists, or artificial statesmen.

The argument for the proposition in question affects to bottom itself upon the freedom of navigation, the liberty of the seas, and the natural power and liberty of sailing over the world. The right which a people has to use its industry in whichever way it seems best to them; the necessity founded in Nature, for commerce, in order to improve the *designed* intercourse of mankind; the equal dignity and independence of Sovereign Powers; the unlawfulness in a war, however just, of converting the privilege of annoying an enemy into the power of abusing a Neutral; all these, and many others of inferior force, are the arguments by which it is endeavoured to support the position.* They are founded, it is said, upon principles of universal equity, which form the great and everlasting code for the government of Sovereigns.† Is it fair, therefore, say they, because two nations go to war, that others, who are impartial in the dispute, are to suffer in their rights? Are they to be curtailed in the means of their subsistence, or the usual exchange of their commodities, which employ and feed so many thousands of defenceless and innocent persons, merely because others have

* Schlegel, Hubner, passim. † Hubner, i. 105.

chosen to quarrel; or because, before the war, one of the Belligerents has been used to derive advantages from the neutral trader, is the latter instantly to be invaded and stripped, in order the better to invade and strip the former? These questions have often been asked, and have as often been answered. In 1780 they were asked with a kind of triumph; and at this moment they are asked at the head of thousands of armed men. Not the less weighty, nor the less firm, however, will be the answer; for, whatever may be the event, it must always be founded in truth.

In truth, then, there is no sort of occasion to dispute any one of these points; because, even if they could be controverted as general positions, without any specific application, which it is allowed they cannot, *they all elude and go beside the real pretension.*

All that we have to examine, says Hubner, is, whether Belligerent States have a right *to prevent Neutrals from trading with their adversaries;* or whether the latter may still continue their commerce with the Belligerent parties, upon the same footing as in times of peace.*

Now, with submission to him, this is not all that we have to examine; for if it was, much of the enquiry might be spared.

The question asked by the Belligerent is of a very different nature. It is not whether he has a right to prevent Neutrals from trading with his adversary, but, neither more nor less than, whether Neutrals do not claim to go infinitely beyond the rights of their trade; whether, in their anxiety to preserve privilege on the one side, a real injustice is not worked on the other; whether, in short, all the advantage is not thrown on the Neutral party, which wholly

* Hub. chap. i. s. 1. page 1.

neutral

bursts asunder the ties of impartiality, and converts the cautious Neutral into a dangerous enemy?

Subject to these questions, indeed, it is not the intention, and according to the improved maxims of modern law, it never was the claim of the Belligerent to interfere with the Neutral. But that security against these is as much the natural right of the Belligerent, as the privileges contended for belong to the Neutral, no one will pretend to deny. For, wherever there is a confliction of rights, one or other, or both, must yield something, and then the right can only be perfect, that is, can only be asserted, *subject to the diminution occasioned by the other.* Throughout all human society, and all human life, it must ever be so; we must recollect, that the most perfect state of civil liberty itself which man can form, is always a state of restriction somewhere: every man that is born in the world trenches upon the *perfect* liberty of some other man, and could we unpeople the earth, or turn the theorist into the desert, for the purpose of enjoying the perfection of liberty, he never would be able to obtain it, on account of the tigers that would contest it with him.

We see, then, that it is not true, because the rights of commerce are founded in Nature, because the sea is free to all, and because men have a right to profit by their industry, that these rights are to extend to such an unqualified height, as never to be modified on any occasion, and even so as to encounter and defeat the rights of others. Let us rather listen to the rational and liberal Vattel, who, speaking of the illegality of contraband, and at the same time of the rights of trade, says, 'the nations who 'renounce it in war suffer, it is true, but suffer from necessity:

'the Belligerent does not oppose their rights, but simply asserts his own; and if the two rights are incompatible, it is 'the effect alone of *inevitable necessity*.'* After all, then, this is a common case, met with under every order of society, beyond the control of man, as he is, and founded in the nature of things. It cannot be illustrated better than by directing our attention to a celebrated maxim of our municipal law. '*Cujus est solum ejus est usque ad cœlum*' is, for example, founded in very true principles of justice; but as it is palpable, how easily, if carried to its utmost extent, it might work the greatest injustice, it is modified and rendered perfect by the addition of that other part of it, '*ita ut alienum non lædas*.'

The diversified class of cases, and varied amplification of the subject, which this maxim alone, *thus guarded*, would generate in every enquiring mind, would furnish of themselves abundant matter to clear all mist from this part of the subject. I shall content myself, therefore, with referring for what is wanting to the well reasoned theory of the Earl of Liverpool, on the Rights and Duties of Neutral Nations, a work to which the visionaries of the *neutral code*, as it is called, have in vain attempted to furnish an answer.†

In granting, therefore, the fair and reasonable enjoyment of their privileges to Neutral Nations, there must always be added the fair and reasonable caution, that they use them so as not to hurt the Belligerent; and that I may not seem to entrench myself in generals 'ubi sæpe versatur error,' I would add, that they have certainly no right to use them in any one, the smallest degree of proportion, *more* than they did in times of peace; nor even in so great a degree, if such

* Droit des Gens, l. iii. s. 111.

† See the Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations, by the present *Earl of Liverpool*.

augmented,

augmented, or the ordinary use of them bears immediate mischief to either Belligerent.

For example, they may increase their purchases to any amount in the Belligerent countries, provided their own consumption requires it, and provided they remain domiciled in their own country. But if they persist in carrying, much more, if they extend their faculty of carrying for the Belligerent, where the latter was in the habit of carrying before; and if, in consequence, he is enabled to come to the battle, and to stand the shock of war with augmented strength, which he never would, nor could have possessed without it, I see little or no difference between this and an actual loan of military assistance. All the distinction is, that he substitutes his own people in the place of taking foreigners; for every man, which the Neutral lends to his trade, enables him to furnish a man to his own hostile fleets. In other words, it enables him to meet his enemy with undiminished forces, and yet preserve entire his sources of revenue; when, if it was not for this conduct of the Neutral, either the forces or the revenue of the Belligerent must inevitably be diminished!

This deduction, I think, is so clear, that the most unenlightened savage, or children in their infant struggles with one another, would instantly, taught as it were by Nature, see its propriety, and act upon it as a principle. We often, indeed, betake ourselves to the Indian's untutored mind, or the child's self-taught springs of action, in order to discover what we think is the natural law: and I should have no objection to submit these diplomatic chicaneries (as they have been called), in other words, these plain and obvious cases of duty, which militate against those who depart from all duty, to the prompt decision of uninstructed Nature. Even Hubner himself, who supposes that he has established a new code in the Law of Nations, relative to Neutrals, which, he

tells you, was omitted in all the codes that preceded him, contends no farther, than that they shall be allowed to carry on their trade as in times of peace; and this with the exception of contraband. But, according to our principles, the same reason which applies to contraband, applies to all *nocent* cases whatsoever. Hubner, in explaining contraband, says, that Neutrals were in the habit of carrying a particular species of commodity before the war, which becomes prohibited by the very state of war, because it assists one or other, or both the Belligerents. We say, precisely in the same manner, that they have been in the habit, not of carrying a particular commodity, but simply of *carrying* before the war; which, if persisted in after the war, must assist one or other, or both the Belligerents: and, exactly upon the same principle, therefore, is this also forbidden.

Let us review Hubner, in his very definition of Neutrality. 'Toute neutralité consiste dans une *inaction entiére* rélativement á la guerre, et dans une impartialité 'exacte et parfaite, manifestée par les faits à l'égard des 'Belligérans; en tant que cette impartialité a rapport à 'cette guerre même, et aux moyens directs et immédiats 'de la faire.' *

Again, in the fourth grand division of the duties of Neutrality, he says, 'Le grand devoir de tout Etat Neutre, 'c'est quil doit faire tout son possible pour établir la paix; 'et que pour cet effet il doit employer sincèrement ses 'bons offices, *a fin que la partie lesée obtienne satisfaction,*

* Hub. p. ii. c. ii. s. 1. See also p. i. c. iv. s. 4. 'Et en 'effet, je ne vois pas par quelle raison les Etats Neutres devroient 's'interdire leur commerce ordinaire avec les Nations qui se font la 'guerre, ou en vertue de quoi celles-ci pourroient leur prohiber de 'trafiquer avec chacune d'elles, comme en tems de paix pourvu 'qu'ils abstiénnent de tout ce qui a un rapport direct et immédiat à la 'guerre; c'est a dire, pourvu qu'ils restent parfaitement *Neutres*.'—See also p. ii. c. i. and ii. Commercer sur le même pié que quand ils sont en paix.

's'il

's'il se peut, si non, *que du moins la guerre soit bientôt ter-*
'*minée.*'

Now, I would ask the common sense of any one man, lettered or unlettered, whether it is a proof of wishing to re-establish peace, or of a sincere employment of good offices, when one of the Belligerents begins to be pressed by the other, and, by consequence, to stand in need of all his military forces, at the expence of withdrawing a portion, or perhaps the whole of the strength and vigour which had been allotted before to the arts of commerce; that a Power, which had hitherto stood by, should step in, and do that for the Belligerent which he was no longer able to do himself? To come a little more into the detail and application of this argument, let us suppose, as was the case with France, a heavy duty upon foreign freight had formed an almost fundamental law of her own commercial code; which, in times of peace, was a kind of Navigation Act, amounting to an interdiction of foreign interference; and that, of a sudden, while engaged in war, wanting her sailors, perhaps her merchant-ships, for hostile expeditions, at the same time wanting the pecuniary and other sources of her trade, which would thus be extinguished, she applied to nations calling themselves neutral, by taking off this duty, or even by bounties, to carry on this trade. Here is a proof how necessary this trade is to her exigencies, and how impossible it is to preserve it, consistently with her warfare. But where is the man of plain understanding, and uninterested in the question, who would not determine, that if the Neutral accepted the offer, that instant he interfered in the war? But Neutrals do thus interfere, nay, they arm in order to support their interference. Adieu, then, to the boasted philanthropy of the Neutral, whose great duty is to do all he can for the re-establishment of peace!—Adieu to those good offices which he is sincerely to employ, in order that the injured party in the war should obtain satisfaction! For if,

according to Hubner's supposition, they can tell which is the *partie lesée*, and, in this case, he should happen to be the stronger of the two, able, as well as endeavouring, to do himself right, the Neutral, by interposing his indirect, but not less powerful assistance in favour of the other, not only becomes a party in the cause, but on the very worst side of it!

These observations apply, very generally, to all the carrying trade; but they more particularly apply to that specific claim in the first article of the Armed Neutrality of 1780, to navigate freely on the coasts, and from port to port, of nations at war. In so far as the coasting-trade of a nation is more valuable and more necessary to its existence than its foreign commerce; in just so far is the interposition of Neutrals more powerful in its favour. That it is more valuable, and almost necessary to existence, it would be needless here to prove, having been already so often proved in the works of many wise men; but if proof were wanting, and the theory yet stood in need of example for support, the French themselves, triumphant and gorged with victory as they are by land, afforded one in this war, almost irresistible. We saw how soon the whole of their foreign and colonial trade was dissipated and destroyed by British victories—we saw them almost systematically yield up their colonies, and turn the whole body of their seamen into cruisers and ships of war. But the coasting trade, from port to port, was absolutely necessary, not merely to their comfort and luxury, but to the very possibility of fitting out those fleets and cruisers, without which, to a certain point of strength, they can never hurt us, were their armies ten times more numerous and more enthusiastic than they are. The efforts of Great Britain were, therefore, naturally directed against this necessary trade; and, by the painful vigilance and active efforts of that gallant set of men, the officers and sailors of the British navy, whom to honour is but to name,

the exertions of the French were crippled in their very ports. Their scattered and ruined convoys so often baffled in their endeavours to enter the ports of maritime equipment, and the consequent delay of months and years in the exertions of an enemy otherwise so active, are advantages, not so brilliant, perhaps, but hardly less useful than those wonderful victories which our fleets have so nobly and so uniformly achieved. They afford a proof indubitable of the necessity of the coasting-trade to all naval exertion in time of war.

Now, to supply this very necessity, when a Belligerent can no longer supply it himself, is the stupendous claim of the Armed Neutrality! What the decision of a mind merely candid and just (for it requires not the aid of lights or learning) must be upon it, I leave to the common sense of any one to determine. Certain it is, that if allowed, it is in vain that victories shall be purchased at the expence of rivers of blood; since, unless they amount to the *extermination* of the conquered, they must and will rise again, through this most just help of neutral exertion. Yet these are the principles of a man, a citizen of the world, the friend of mankind,* in the very moment of laying down a rule, founded, as he says, in the primitive law of universal justice, that neutrality is *not to interfere in the war*, and that one of its grand duties is to do its utmost, by sincere good offices, to bring about the establishment of peace.

It is really surprising to observe the injustice into which an honest, but misdirected love of justice will often hurry men, when the mind is under the dominion of a particular bias, or warped by the love of a favourite system. Hubner professes every where that Neutrals have a right to trade in war as they had a right to trade in peace; the unsoundness

* Hubner, in his Preface.

of

of which doctrine, as an universal rule, I have been endeavouring to shew. He is startled, however, by the terms of his own premises, when he comes to consider their right to a colonial trade in war, to which they had no right during peace. That trade having been generally forbidden them, and never opened except in cases of necessity in war, a necessity occasioned by the pressure of the superior Belligerent, a gleam of the injustice alluded to comes across him, and he pauses before he allows its legality. He sees (for even he is obliged to see) that it has, to use his own terms, 'Un rapport direct et immédiat à la guerre, parceque les mêmes peuples neutres ne le font jamais, et n'osent le faire en temps de paix; qu'il ne leur est ouvert qu'en temps de guerre, et *à cause de la guerre;* et qu'enfin au rétablissement de la paix ils en sont dérechef exclus.'* He is obliged to allow, therefore, that *quelque incertitude* hangs over this part of the subject; yet, without attempting to remove the uncertainty—without one syllable to reconcile the difficulty—the very next sentence asserts, 'that he sees no reason why Sovereign States which are neuter ought to refuse to themselves *so considerable an advantage as presents itself*, provided they abstain from supplying those colonies with contraband.'†

Here, in fact, is developed the whole mystery of the subject; because here, in spite of all disguise, is the true reason of the claim: 'Neutrals *cannot refuse to themselves so considerable an advantage;*' which, word it as delicately as they will, is neither more nor less than to say, that the wars of others, instead of calling for all their sincere good offices for the *redress of the injured party*, or, at least, for the re-establishment of peace, are, in truth, the harvest of Neutral

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* Hub. p. i. c. iv. s. 6. † Ib. p. i. c. iv. s. 6.

Powers, by making them the carriers of the weaker party.* Whether that party is the one injured, or injuring is no where stipulated; for, in the works of Hubner, or Schlegel, it seems indifferent which it is, *provided the Neutral is employed;* and in that case the Neutral cannot certainly '*refuse to himself so considerable an advantage.*'

It is really revolting to observe this contradiction, and how little regard is thus paid to his own principles by Hubner, though it is this, perhaps unwary discovery, that leads him, in the same spirit, to confess, speaking of the established law, that enemy's goods shall be lawful prize wheresoever found: 'Que celle des parties Belligérantes, dont la marine 'marchande, et par conséquent aussi la marine guerriére *est* '*fort inférieure* a celle de son ennemi, n'insistera jamais sur 'la vérité de la maxime que nous combattons.'† He then goes into

* This part of the argument is put with great force and clearness by the Earl of Liverpool, in his Discourse on Neutral Nations. He ends it with observing, that 'if this right were admitted, it would be the interest of all Commercial States to promote dissensions amongst their neighbours.'

† Hub. p. i. c. iv. s. 5. It is curious to observe the complete proof, in point of experience, which this observation received from the Declarations of the Courts of Madrid and Versailles, in answer to the Russian Declaration of an Armed Neutrality. Although those two Powers had been uniformly famous in Europe for the severest maritime laws against Neutrals, having been, perhaps, the first to enforce, and the last to relinquish, the maxim, not merely that enemy's property is confiscable on board the ships of a friend, but also that other, that 'Robe d'ennemi confisque celle d'ami;' yet they were now, for the first time, fully convinced of the injustice of their conduct. They were feelingly alive to the injuries that the Northern Courts had sustained. They had discovered how founded in justice, how consonant with true moderation, how advantageous even to Belligerents, were these principles, for the defence of which they themselves were then actually at war! It is scarce necessary to point out, however, the wonderful changes which twenty years produce. These principles, here so plainly assented to, were all swept away in the whirlwind of the French Revolution; and the Directory discovered, in 1798, that Belligerents are not only in the right to oppose them, but, by their decree, confiscate all vessels, not merely which shall carry enemy's property, but enemy's manufacture. Bonaparte again discovers

into a disquisition, to prove that their acquiescence is the more just, because their profit in their commerce with Neutrals is much diminished in time of war, owing, as he expressly states, to the ruin of their own trade, the greater consequent necessity for the interposition of Neutrals, the greater demand which the latter will therefore make as the price of their assistance, and the greater charges which they are really obliged to incur, in consequence of the dangers they run in the difficult service they have undertaken. With due submission to those who approve this writer, this reasoning is the strongest that can be adduced against his own positions; for the higher price that is paid for neutral interposition, the stronger is the proof of the imperiousness of that necessity to which the weaker Belligerent is reduced. The more palpable, therefore, the evidence that the Neutral is interposing against the honourable and legal exertions of the superior Belligerent. It admits also, in a manner too undisguised to be misunderstood, the real and sole object of the weaker Belligerent, and of the Neutral carrier, in their endeavours to beat down the lawful and just opposition set up against their most unlawful conspiracy; namely, that the one may be able to fight the longer; and that the other may, *without danger*, put money into his pocket, for supplying him with the means of fighting. This would inevitably be the consequence of agreeing to the principle contended for, as a point of universal law: and whenever that point is carried, there scarce ever will be any end, except the most

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discovers that Kings, in this instance at least, were more just than Directors, and announces that the North, being about to arm in defence of the liberty of Navigation 'peut compter sur la France!' Contrast this with the steady, consistent, and dignified conduct of Great Britain, laying down the principle, on the side of Belligerents, as founded in real and natural right, and, under whatsoever pressure, never departing from it thus laid down.

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shocking, to a maritime war where the forces are nearly equal. Since, although, one party may be weakened in the shock, his loss will be supplied, and his powers renovated, by the '*good offices*' of Neutrals, which, if perchance, he should in his turn acquire the superiority, would immediately be transferred to his antagonist, (as in the true neutral spirit it ought to be); and so on eternally, till one or other, or both, perish altogether in the contest.

The supporters of this claim imagine, that it is not liable to so warm an inculpation, because the Neutral is, or ought to be, ready to serve both parties with the same readiness and zeal. According to all the theories, it is laid down in due order, that neutrality is thrown off, by shewing any favour to one which is refused to the other; and this readiness to assist the superior when he shall want assistance, is thought to bring all round again. But upon this it must be remarked, that complaint is not made so much for a preference shewn, as an injury done; that at the time of the act complained of, the assistance is not wanted by the superior; and although it must be owned, in all schemes of morality, that men should judge in every other person's case, as if that case was one day to become their own; yet, even in those cases, judgment is supposed to be given according to general rules of action, applicable to all the world, and for the advantage of all the world, not with a partial view to our own particular interest. If, then, it is for the benefit of all the world, that when two nations appeal to the sword, and the surrounding nations have declared that they will take no part, those nations should be loyal to their declarations, and assist neither party; it is not less a falsification of their word, that they will assist both. If this were so, it would hold equally good, if the indirect assistance complained of was extended into a more direct interposition, in the case, for instance, of actual military aid; and then we should arrive at

this singular consequence in the reasoning, that a nation was perfectly neutral, because it sent an army of its own citizens to cut one another's throats, on each side of the question.

But I own, it is to me matter of astonishment, that writers should stop here, and not carry the principle farther, so as to affect articles of acknowledged contraband. If this right of navigation is really so sacred, and so extensive, that I am quietly to see my enemy's trade, (that fund from which a maritime enemy strengthens the sinews of maritime war,) carried on under my eyes, pass, as it were, through my very hands, be lodged, perhaps, for a time within my very ports (for who knows that the right is not to extend to Neutrals coming for refreshment or repairs within the dominions of the Belligerent ?) I see no reason why it should not extend to contraband, provided there is no treaty. If the claim is founded upon so sacred a privilege of commerce, that no circumstances can modify or curtail it ; if it is founded upon the absoluteness of the freedom of the sea, and the entire want of dominion, and consequent jurisdiction upon the ocean, the same foundation applies equally to contraband of war. If I cannot take a bale of enemy's cotton from a neutral ship, merely because she has a right to traverse the sea where I have no authority ; as little authority have I to stop and search, or seize her, because she is loaded with cannon, though avowedly for the use of my enemy. Yet Hubner agrees that contraband of war is always seizable, although not the subject of any treaty with the captor. Either, then, the reason for the principle in question is false, or contraband of war must pass free; but the latter does not pass free, even according to him: the reason, therefore, of his principle is false.

That I do not overstep the bounds of fair reasoning, in carrying thus high the principle of Schlegel's master, will at least be not denied by Schlegel himself ; for the praise of consistency must certainly be afforded him, who says in terms, that contraband, 'quoique fondée sur le droit des gens *conven-*

'*tionel* actuellement en force, n'est pourtant pas conformé 'au droit des gens naturel.' * By *conventionel*, he every where means founded on treaty; and as I shall, perhaps, presently have occasion to shew, both Schlegel and Hubner must have most inaccurate ideas of a law binding on all nations, if they identify it with a law binding upon those only who have made treaties. Be this as it may, the glory of overturning every received notion upon the subject most certainly belongs to Schlegel. In this passage, the mask is fairly thrown off, and it is roundly and boldly asserted, that unless nations have had the precaution to stipulate by treaty against dealing in contraband, there is nothing in the law of their duty to prevent them.

The same inviolable right of commerce, which no Belligerent can by the Law of Nature have power to control, will extend also to the power of entering a blockaded port, which even the articles of the Armed Neutrality, and the visionaries that defend them, hold to be unlawful. But why unlawful, since the Law of Nature permits a Neutral to visit the Belligerent when he pleases? Above all, it encourages and enjoins commerce, and they ought not *refuse to themselves so considerable an advantage as they would derive from supplying a blockaded port with necessaries!* Here, then, is another instance of conflicting rights, which never can be enjoyed by both claimants together. The besiegers have a right to attack and block up a hostile garrison; they hope to make it bend to the force of their assaults, or the vigilance of their blockade. They therefore draw lines of circumvallation by land, and guard with strictness the mouth of the harbour, all which they have a right to do. But a Neutral

* Exam. Im. 68, 126. Vattel allows, that if a neutral nation trades in arms and ammunition, ship-timber, &c. it may continue that trade with both the Belligerents; but he confines this expressly to the case, where 'mon ennemi va acheter lui même dans un pays neutre.' D. des G. iii. s. 110, 111.

appears with his right also; he is in friendship with both, he is not going to man the batteries of the besieged, or to carry stores of war to their exhausted magazines; he is simply going to trade with them in innocent articles, *provisions* for example, or to take within *the neutral dominion and protection of his ship* all the most valuable articles of the place. Why may he not do so, having the right to traverse the sea, and at the same time preserve his neutral relations, and more especially having a right, had he remained at home, to receive within the protection of his territory any part of the treasure of his belligerent friend? It has been answered, because this is interposing directly in the war; because the place being fully surrounded, there is no hope of escaping to the besieged; they are, as it were, in the situation of a conquered party; the prey is half killed in fair action: not only, therefore, no assistance shall be given, but the capability of giving assistance shall not even be attempted. But these propositions, though it is impossible to withhold our assent from them upon other grounds, I own, I do not see the force of, upon the principles we have been examining. I am sincere in saying, that if those principles are just, to the extent claimed by the Neutral, I cannot see what law it is that is so forcible upon the minds of the whole world as to make them agree, even in the articles of the Armed Neutrality itself, that a Neutral shall not attempt to elude a blockade.

These observations apply also to breaches of an embargo, which all agree, even to the Emperor Paul, may be legally ordered, and when ordered, can never be broken without fault. It was, no doubt, his conviction of the sacredness of this right of the Belligerent which made him give orders for the English ships, that endeavoured to break it at Riga, to be burnt by way of punishment. Here eminently, therefore, is an instance where the champions of Neutrality themselves confess that there are rights belonging to one nation

which may be disturbed, and indeed annihilated, by the superior rights of the other. Why they should be allowed in these instances of contraband, breach of blockade, and of embargo, and not extended to the whole carrying trade of enemies, I am seriously at a loss to hazard a conjecture.

There is yet another instance of the interposition of Belligerents with Neutrals, too illustrative of the subject to be passed over here. All mankind, except Schlegel, have hitherto consulted their common sense, and supposed, that the subjects of a State at war are really at war also, and therefore liable to be attacked in their property and ships. The experience of the world, since the world began, has in consequence permitted Belligerents to make prize of the private ships of their enemy. The justice, however, of the world, whatever was thought of the matter formerly, has for a long time determined, that if the goods of a friend are found on board, that circumstance alone shall not condemn them, but that they shall be fairly and honestly restored. The restoration, however, cannot, in the nature of things, be effected without subjecting the party to considerable inconvenience. The chances of being damaged or spoiled, while frequently unshipped; of perishing, if of a perishable nature, on shore; and the certainty of delay by the interruption of their voyage, occasioning manifest loss and disappointment to the owners, are the almost inevitable consequences of this legal capture, even upon the most immediate and faithful restoration. But who is to suffer, or who is to blame for this loss? The Captor exercising the just rights of war? certainly not; but the unfortunate Neutral, who, with his eyes open, entrusted his fortunes to the protection of a party, who, he knew, was liable to be deprived of the means of protection. We see, then, how visionary, partaking of little less than the original Jacobinical madness, are all schemes of right and duty, not adapted to the actual nature of man. We see that it is not true, as has been supposed by this well meaning professor, that Belligerents have only

rights to exercise with respect to Belligerents; none with respect to Neutrals;* they have, in this very instance, an absolute right to do what may occasion, as we see, very considerable loss and mortification to Neutrals, yet are wholly without blame and without responsibility, the misfortune being founded, as Vattel has before well observed,† in the nature of things, and inevitable necessity.

But another argument for the principle now meets us, more ingenious in its construction, if not more convincing in its effect; and it is gravely brought forward too by the man who is to review a judgment of Sir William Scott. He borrowed it from Hubner,‡ who advanced it in the war of fifty-six; and he borrowed it from Michel, who advanced it in the war of forty-five;§ from what sophist it was borrowed by the latter, it is of little consequence to enquire or to know.

It is clear, says their argument, by the allowance of Belligerents themselves, that the neutral *territory* can never be attacked, visited, or searched, without a violation of neutrality. All enemy's property, therefore, which is in harbour, or on shore, even though under the eyes of the other Belligerents, is safe, because inviolable without the overthrow of law. Now the ships of a neutral State belong to the sovereign or the individual who equips them, and the ports from which they sail. This is clear from the flag they bear, and from their being always amenable to the laws of their country, in whatsoever part of the sea they may be. For, if it were otherwise, their crews would actually return to a state of nature, might commit all manner of crimes without any control of magistracy, and every vessel would form so

* Schlegel, 53, 54, 55.
† D. des G. I. iii. s. 111.
‡ Hubn. T. i. 211, 212.
§ Exposit. des Mot. &c. du Roi de Prusse.

many

many independent republics, and be endowed with the rights of peace and war. But as this would be too absurd to be admitted, all must acknowledge, that neutral vessels upon the sea are within the sovereignty of the neutral State; and, consequently, the principle, that free ships make free goods, is not arbitrary, but is derived from the nature of things and the universal law of nations.

This wonderful discovery, if it means any thing, is introduced in order to found upon it a proposition, which would indeed be wonderful if admitted, namely, that because a Swedish ship belongs to Sweden, (for the discovery is nothing more,) though swimming upon the high seas, though coasting from port to port of an enemy's country, though passing from colony to colony, and from the colonies to the mother country, though employed, in fact, in the domestic service of the enemy, perhaps half manned by him, certainly transporting and exchanging his cargoes for him, yet she in reality is not a ship all this time, but Sweden herself; at least, in all her rights and privileges to give protection, she is precisely and identically the same as so much Swedish territory.

It requires little to refute this visionary sophism. If gravely relied upon by the author who brought it forward, he surely does not advert to the true nature of dominion, which is simply neither more nor less, than a right which a people have to do any act, of whatsoever nature, within certain districts, in consequence of the absolute power over those districts which they possess. Sweden is thus under the *dominion* of its inhabitants. That hardy and high spirited race has always vindicated its independence; but could Sweden float like her ships through the sea, or wander, like hordes of Tartars or Arabians, through deserts which no body claimed, and should she be exposed in her progress to encounters with other nations that were Belligerents,

rents; her sovereign inviolability might be attacked by others, every moment that she used her locomotive power for the purpose of annoying them. Consequently, if in her progress she adopted, *or had originally conceived,** the design of doing what was hostile to those under whose dominion she should happen to come, or whom she should happen to meet in places where no dominion was paramount to both, the rights of examination and judgment according to law would instantly accrue.

The true reason, therefore, is founded, not in a pretended right of dominion over the sea, which is, even in these times either wilfully or ignorantly supposed; not in any distinction which is made between the Swedish sovereignty within the planks of its ships and the shores of its territory, but in the simple circumstance, that, from their power of moving over the face of the globe, the goods of enemies in neutral ships are called forth into action, may be used directly to the annoyance of the other Belligerent, and at very least are working, while in the course of trade, the direct advantage of those who ship them. In this point of view, therefore, it matters little whether it be a ship or a waggon, and the reasoning of Schlegel upon the difference between maritime and continental war is, like most of his other sophistries, easy to be examined, and never standing the touch of examination. We state, therefore, in this reasoning, nothing but a plain, known, and received maxim, that no nation, professing neutrality, shall assist either Belligerent in the war, whether endowed with stationary or locomotive power. The former will make not the least difference, either in the principle, or in the rights founded upon it; for, if the Sovereign of a State that possessed not a ship in the waters, aided, com-

* It is to be observed, that the Swedish convoy set sail from the Baltic with instructions to resist the exercise of the right of search, if attempted.

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forted, and encouraged one Belligerent against the other, his neutrality would be instantly broken, and the right of complaint and of punishment would as forcibly accrue, as if his fleets had engrossed the carrying trade of the world. For example, if he suffered him *exclusively* to make levies in his territories, never having done it before, and expressly to be employed against the other party;* if he furnished him with corn, *never having previously* lent it him,† and expressly to be employed for the equipment of an expedition; if he allowed him to march an army through his country, expressly to invade the other *more commodiously;* if he lent him a strong place on his frontiers, for the purposes of alternate retreat or annoyance,‡ or sold him arms and ammunition, or equipped him again with the means of offence, of which the fortune of war had divested him; in all these cases, the Belligerent injured might prevent him by every means in his power, as much as he might prevent the actual attempt at assistance upon the sea, and even, if unredressed, to the denunciation of war. Thus also, though a maritime Neutral Power should strictly abstain from carrying the trade of a Belligerent, or supplying him with contraband; yet, if he opened his ports to his privateers *for the purposes of hostile equipment;* if he gave him shelter for his prizes,§ or lent him his courts, or suffered him to erect his own, for the purpose of condemn-

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* Vattel, l. iii. s. 110. † Ib. ‡ Ib.

§ The governors and ministers of the United States, during this war, have, in many instances, exhibited admirably clear proofs of knowledge in the laws of neutrality, and of spirit to enforce them in their contests with the *philosophers* of France: not only refuting their attempts to change the laws in this instance, by insisting upon the liberty of seizing Belligerent property within the American jurisdiction; but enforcing that refutation by restoring prizes thus made. See the long note from Adet to the American Secretary of State, 5 Debrett's State Papers, 263 to 294; and the Secretary Pickering's most able answer, 6 Deb. 281 to 339.

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ing them;* in all these cases, also, there would be a breach of neutrality, and cause for war.

Here then is the true principle: the actual assistance given to a Belligerent, whether stationary or transitory. There is, however, a most material distinction between them, which, far from depriving the injured Belligerent of his right of prevention, calls for it in a ten-fold degree; because the injury is attended with ten-fold aggravation. When pretended Neutrals lend their ships to the trade of the enemy; the assistance, from having been passive, as in the other examples, becomes instantly active: it not only affords aid, but carries the supply; and the force and power of the mischief is thus felt in augmented proportion. The dominions of a maritime Belligerent being, besides, scattered over the face of the whole world, new difficulties arise to him in the course of war. The variety of his colonies, islands, fisheries and factories, require a minute diversion of his protection, which, for the most part, embarrasses him. The locomotive assistance of his neutral friend does him, therefore, here the most active and essential service, and marks the partiality of it in exact proportion as it is active and essential. Supposing, then, for a moment, the dominion within the sides of a ship to be the same as the dominion of the country which equips it, the complaint here is not so much that she affords protection, as that she actually carries the property protected; an injury which it is physically impossible for protection on shore to commit. In the latter case, while the property lies harmless in the store, the harmless rights of friendship are chearfully allowed; in the former, actual mischief to another is so interwoven with those rights, that Neutrality is broken, and impartiality at an end.

* As was attempted by the French in the commencement of this war, in endeavouring to set up a Consular Tribunal, with Admiralty powers, in Denmark and other Neutral States.

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These, then, are the simple and plain principles upon which we proceed; and they will also easily afford an answer to an observation which is made with no small confidence by the Danish Professor, that neutral rights *are more respected* in a continental than a maritime war. As a proof of this, he says, it is ever held unlawful to plunder individuals who do not bear arms, although subjects of the enemy himself; and that Belligerents permit Neutrals to pass through their countries to the great fairs that are held upon the Continent at stated times.*

Now, in the first place, the observations are false in point of fact; but, if true, they will not bear the conclusions built upon them. Did the Professor never hear of the sack and pillage of towns, and the murder of innocent persons, in a storm? Did he never hear of the ravage of the Palatinate, where hundreds of harmless cottages were laid smoaking in ruins by the most accomplished and most humane of his time, reduced, by the inferiority of his numbers, to waste a whole country, in order to prevent the irruption of the enemy? According to the accounts of historians, in the act of blaming him, all the evil that he did, appeared to be necessary, and, if he sacrificed the principles of humanity, it was to the duties of a General and the rules of war.† In later times, has the Professor never heard of instructions from a French Minister, in the same spirit, to make a downright desert in Westphalia, as a mere plan of defence?‡ At least, did he never hear of such things

* Examen. Impar. 1, 2, 46.

† Voltaire, Siec. de Louis XIV.—Mod. Un. Hist. 21, 392.

‡ See the Instructions from Belleisle to Contades, taken amongst the latter's papers after the battle of Minden. These are some of the extracts.—'After observing the formalities due to the Magistrates of Cologne, you 'must seize on their great artillery by force, telling them that you do so for 'their own defence.' 'You must destroy every thing which you cannot 'consume, so as to make a downright desert of Westphalia.'—'Though the 'Prince of Waldeck is outwardly neutral, he is very ill disposed, and 'deserves

things as contributions from States that had never offended; such, in this very war, as Frankfort and Leghorn, where the failure in supplying the demand brings down instant punishment by fire and sword? One would think that he would have certainly relinquished his remark, had he ever reflected on these or other severities; the frequent bombardments of the most beautiful cities, crowded with innocent and unarmed inhabitants; such desolation as was practised at Dresden, in the seven years war, where whole suburbs were fired by the hot balls of the town itself, and where the lives of hundreds, and property of thousands, were sacrificed to the cruel necessity of the terrible state of war.* Could we stop the current of the argument for a few moments, and examine the transactions of continental campaigns, what immensity of proportion would the injuries done to

'deserves very little favour. You ought, therefore, to make no scruple of 'taking all you find in that territory: but that must be done in an orderly 'manner, giving receipts, &c., &c. Zippe and Paderborn are the most 'plentiful; *therefore they must be eaten to the roots.*'—The French defended this upon the legality of wasting a country, in order to cut off subsistence to the enemy. Ann. Reg. 1759.—Again: observe the orders of Broglio, when conqueror in Hanover, to the civil and *unarmed* inhabitants. 'Whereas many civil officers and principal inhabitants of Brunswick and 'Hanover have withdrawn themselves, &c., they are ordered to remain 'in their houses, with their cattle, *upon pain of having their houses pillaged,* '*and levelled with the ground, and themselves punished according to the* '*exigency of the case.*' Ann. Reg. 1761. Severe as all this appears, it is, perhaps, not indefensible by the laws of war. But even if they are not, as Schlegel observes upon the *fact* of superior continental regularity, they are proofs in full of the easy rashness with which a visionary assertion is made.

* See the Memorial of the King of Poland, published at Vienna on the raising the siege of Dresden. Smollet's Hist. of Eng. 15, 49; and his other Memorial presented by the Saxon Minister to the Diet of the Empire, 24th Nov. 1758. Its force was somewhat diminished as to *facts* by the answer of the Prussian Minister; but whichsoever is true, enough is left for the support of the argument; the contest being only as to the quantum of the destruction. See Ann. Register, 1758.

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unarmed inhabitants, both of Belligerent and even Neutral States, bear to the few comparative seizures made upon the seas! Nor should we draw the examples from savage or ignorant Commanders, but from the deliberate determinations of a *philosophic* King of Prussia, a good-natured Turenne, and even of the almost perfect Gustavus Adolphus himself.

The whole of Schlegel's errors proceed, as it appears to me, from a want, I cannot say of a right understanding, but of a right use of fixed and clear principles. Let him only once bear in mind that first and comprehensive rule, embracing almost all the laws of war, both by sea and by land, '*that we may do whatever mischief is not unnecessary;*' and all, or nearly all the severities that have been touched upon, both by sea and by land, may be perfectly reconciled.

And here I might close the discussion of the principle, if the opinion I have embraced depended for support, or could ever obtain the authority of law, on the private speculation of an individual in his closet. But as this cannot be, even in a matter that depends eminently upon the determinations of reason and general equity; I proceed to shew that this is not a mere private speculation, unfounded in experience, but drawn from the authority of those wise and enlightened men by whose virtue and science the governors of the world have generally been directed, and must always be influenced.

SECOND SECTION.

THE REASONING FROM AUTHORITY AND CUSTOM.

IT is remarkable, that from the time when the Law of Nations began to exist as a science, since which, if we take it from the publication of the *Consolato del Mare*, a period of full five hundred years has been revolving, the stream of authorities, until the middle of the last century, has been against the principles of the Armed Neutrality. In that latter time, the provisions of the *Consolato* were boldly called in question, and, in the first instance that I know of, an attempt was made to establish the contrary. I allude to the famous *Exposition des Motifs* of the King of Prussia, addressed to the Ministers of George II.; famous, however, more for having called forth the well-reasoned piece of law which formed its answer, than for any merit of its own for soundness of principle, or cogency of deduction. Until the year 1752, when this diplomatic piece appeared, the law, as I have reasoned it, seems to have been admitted. The claim had, indeed, often been started by particular countries; but it was started without success even by De Witt; and whenever it was granted, it was granted as a boon, obtained by the stipulations of particular treaty. No one authority, that I can find, before this, had ever laid claim to it as a natural right; and even Schlegel allows that it was then, for the first time, that the rights of Neutrals were completely discussed. 'Il (roi de Prusse) fit imprimer une 'defence publique, dans laquelle les Droits du Pavillon 'neutre furent *pour la premiere fois completement discutés*.'*

* Schleg. 5.

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We cannot help, therefore, pausing in this place, to observe the artful manner in which he has treated the history of the claim: for, in the outset of his work, he would have the world think that, in the beginning of the sixteenth century, the *Consolato* was set aside (in form, I suppose, by a kind of general convention), and that other laws, more consonant, according to him, with neutral rights, were established in its place. Certain it is, he leaves it to be supposed, that it was about that time that the merchants obtained the abrogation of the old law, in consequence of which it was determined, that a Neutral vessel should no longer be stopped on account of her having enemy's property on board.*

That such an assertion, if he meant it, is most erroneous, we shall soon have occasion to prove; but be it true or false, the confession in the passage above cited is totally repugnant to it; and thus from his own authority is demonstrated his own inconsistency.

In tracing the history of authorities, let us come, then, to the consideration of the famous *Consolato*, that venerable pile of maritime and commercial law, whose origin is of such remote antiquity, and rooted so deeply in the annals of time, that

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* 'Dans les 14me & 15me Siécles, presque tous les traités furent faits 'd'après ce principe. Mais comme il en résultoit mille chicanes lorsqu'il 'agissoit de decider de la propriété des cargaisons, surtout depuis que les 'marchands eurent abandonné l'ancienne coutume de suivre leurs marchan-'dises sur les navires, & comme des lors la cargaison se trouvoit souvent 'appartenir à diverses propriétaires, les négocians qui faisoient le commerce 'maritime desirérent une autre disposition générale qui tendit mieux à les 'garantir des mauvais traitemens des corsaires. Il fut en conséquence 'déterminé qu'on n'auroit plus égard au propriétaire de la cargaison, mais 'à celui du vaisseau;—qu'un vaisseau neutre ne pourroit plus être arrêté 'parce qu'il auroit à bord des merchandises ennemies, & encore moins parce 'qu'il seroit destiné pour quelque port ennemi, sauf toute fois le cas où il 'seroit chargé de ce qu'on appelle *contrebande de guerre.*

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no one can tell with certainty at what period it was composed.* Be this as it may, it was the received rule of conduct which governed the greatest maritime nations; was the oracle of their tribunals, and decided questions of prize, whether relating to the property of enemies or neutrals, or abandoned to fortune without any owner. This ancient compilation contains the constitutions of the Greek and German Emperors; of the Kings of France, Syria, and Cyprus; of Minorca and Majorca; of the Venetians and Genoese. Greater authorities can scarcely be found, and need not be required. The German Emperor at that time reigned paramount in the Netherlands, and on the southern shores of the Baltic; and Constantinople and the two Republics were, as is well known, the arbiters of trade and the lords of the sea. These constitutions, therefore, governed by far the greater and the most important parts of the commercial world.

The cclxxiii. chapter of this compilation contains the following provisions:

'If an armed ship, or cruiser, meets with a merchant ves-'sel belonging to an enemy, and carrying a cargo, the pro-'perty of an enemy, common sense will sufficiently point out

* I cannot do better on this subject than transcribe a note of Dr. Robinson, prefixed to his translation of some passages in the Consolato :—

'With respect to its antiquity, the reader is referred to the table prefixed 'to the Italian editions; in which it is specifically asserted to have been 'received at Rome, in the year 1075; and at various places, at various 'periods, through the 11th, 12th, and 13th centuries. But let him consult 'also Giannone's Ist. di Napoli, lib. xi. chap. 6, in which, according to 'some opinions, this compilation is supposed not to have been made till 'the time of Louis IX. of France, towards the middle of the 13th century. 'It is, however, generally allowed to have been composed from the 'Amalphitan Table; and as that is supposed to have existed as a body 'of sea laws, of great and extensive authority in the Mediterranean, from 'the close of the 11th century, there may, perhaps, be no great variation 'in the substance of these two accounts.'

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what is to be done: it is, therefore, unnecessary to lay down any rules for such a case.

'*If the captured vessel is neutral property, and the cargo the property of enemies, the captor may compel the merchant vessel to carry the enemy's cargo to a place of safety, where the prize may be secure from all danger of re-capture; paying to the vessel the whole freight which she would have earned at her delivering port;* and this freight shall be ascertained by the ship's papers; or, in default of necessary documents, the oath of the master shall be received as to the amount of the freight.*

'Moreover, if the captor is in a place of safety, where he may be secure of his prize, yet is desirous to have the cargo carried to some other port, *the neutral vessel is bound to carry it thither:* but for this service there ought to be a compensation agreed upon between them; or, in default of any special agreement, the merchant vessel shall receive for that service the ordinary freight that any other vessel would have earned for such a voyage, or even more: and this is to be understood of a ship that has arrived in the place where the captor may secure his prize; that is to say, in the port of a friend; and going on an ulterior voyage to that port to which the captor wishes her to carry the cargo which he has taken.

'If it shall happen that the master of the captured vessel, or any of the crew, shall claim any part of the cargo as their own, they ought not to be believed on their simple word, but the ship's papers or invoice shall be inspected; and, in defect of such papers, the master and his mariners shall be put to their oaths; and if, on their oaths, they claim the property as their own, the captor shall restore it to them;

* Bynkershoek, nearer to us by six hundred years than the *Consolato*, while approving the former part of this article, rejects the right to freight, because it has not been earned.—*Quest. Jur. Pub.* cap. xiv.

regard being paid, at the same time, to the credit of those who swear and make the claim.

'If the master of the captured vessel shall refuse to carry the cargo, being enemy's property, to some such place of safety, at the command of the captor, the captor may sink the vessel, if he thinks fit, without control from any power or authority whatever; taking care to preserve the lives of those who are in her. This must be understood, however, of a case where the whole cargo, or, at least, the greater part of it, is enemy's property.

'If the ship should belong to the enemy, the cargo being, either in the whole or in part, neutral property, some reasonable agreement should be entered into on account of the ship, now become lawful prize, between the captor and the merchants owning the cargo.

'If the merchants refuse to enter into such an agreement, the captor may send the vessel home to the country whose commission he bears; and in that case the merchants shall pay the freight which they were to have paid at the delivering port. And if any damage is occasioned by this proceeding, the captor is not bound to make compensation; because the merchants had refused to treat respecting the ship, after it had become lawful prize; and for this farther reason also, that the ship is frequently of more value than the cargo she carries. If, on the other hand, the merchants are willing to come to a reasonable agreement, and the captor, from arrogance, or other wrong motives, refuses to agree, and forcibly sends the cargo away, the merchants are not bound to pay the whole, nor any part of the freight; and, besides, the captor shall make compensation for any damage he may occasion to them.

'If the capture should be made in a place where the merchants have it not in their power to make good their agreement, but are, nevertheless, men of repute, and worthy to be trusted, the captor shall not send away the vessel, without being

being liable to the damage; but if the merchants are not men of known credit, and cannot make good their stipulated payment, he may then act as it is above directed.'*

Such expressly are the provisions of the *Consolato del Mare*, some of which have stood the test of ages, through all the wonderful alterations in manners and jurisprudence which Europe has seen; an abundant proof of their deep foundation in the truest principles of reason and justice. If proof, however, were wanting, I seek no other, than to find those at least of them, that form our immediate subject, approved, and adopted word for word, in the writings of three men, all of them foreigners, of countries whose interest it eminently is to support this Neutral claim; but who, if it was not, must for ever stand at the head of the whole world's college of civilians, for experience, learning, and good sense. The writers I mean are no less than Grotius, Bynkershoek, and Heineccius. And first of the wise, and liberal Grotius.

He at least will not be suspected of being a partial or interested advocate in our favour, even if the whole tenor and plan of his book did not shew that it was written for the world. During the first part of his life, his country was Dutch, his interests were Dutch; when driven from his home, his asylum was France; and when adopted into another State, that State was Sweden. How well, and how zealously he was disposed to assert the privileges of the latter against this very England, with whom she now prepares to quarrel; his hot and eager contest for precedency with the English Ambassadors, sufficiently demonstrates.† But he was actually, besides, the great champion for the freedom of navigation; being the first to pull down the dominion of the sea, (also against the pretensions of England;) and he lived

* This translation is by Dr. Robinson.

† Burigny Vie de Grot.

in a time, when his countrymen were raising to its height the source of their wealth, by rendering their State the emporium of trade, and becoming the carriers of the rest of the world.

From such a man little could be expected in favour of any tyrannical pretensions; still less of pretensions that clog the freedom of navigation; and more particularly of Dutch or Swedish navigation. Yet, as has been said, he adopts the rule of the *Consolato*, that enemy's property shall not be covered by Neutral vessels; and he, as well as Heineccius, adopts it in chapters in which they expressly state how controversies of this sort are handled.* Yet, strange to say, Hubner, from what cause I know not, asserts, in terms in his preface, after stating that the *Consolato* relates, amongst other things, to capture, and recapture, 'ni les 'unes ni les autres ne sauront être *d'aucun secours* a ceux 'qui voudroient discuter les droits des nations Belligérantes 'au sujet de la navigation des peuples neutres.' † Whether Hubner had carried his research, or his zeal, so high as to despise the assistance of this compilation, it is not for me to enquire; but Grotius at least paid it that deference, which

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* Grot. de Jur. Bel. l. iii. 1, 5 notis. 'Ubi ex instituto tractantur hujus generis controversiæ.' Heinec. de Nav. ob Vec. Merc. Vet. Com. cap. viii.

† Other readers will, perhaps, be more disposed to esteem it a valuable, but hidden treasure, with the very respectable names of Casaregis, Valin, and Emerigon, than to join with speculative theorists in terms of disrespect, calling to mind the words of Emerigon, who says, of this work, and of Hubner's criticism on it: 'Cet auteur, ayant trouvé 'dans le chapitre 273, *des décisions contraires à son système*, à été de mau-'vaise humeur, contre l'ouvrage entier; mais si'l eût examiné avec quelque 'soin, il se serroit convaincu, que les décisions, que le consulat renferme, 'sont fondées sur le droit de gens. Voila pourquoi elles *réunirent les* '*suffrages des nations;* elles ont fourni une ample matiere, aux rédac-'teurs de l'ordonnance de 1681; et malgré l'ecorce Gothique que les 'enveloppe quelquefois on y admire l'esprit de justice, et d'equité que les 'à dictées.'

Dr. Robinson's translat. of the Consolato.

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as an authentic monument of what was thought and practised by our ancestors, it must generally command, and always deserve.

Let us now then examine the opinions of Grotius himself; premising, however, that he is not treating of maritime matters in particular, neither does he confine himself to the land; but that it is *principles* which he lays down; and that he speaks *generally* of the duties of Neutrals and the rights of Belligerents. 'A question,' says he, 'often arises upon 'what is lawful, with respect to those who either are not, 'or profess that they are not enemies, yet *supply the enemy* '*with any sort of commodities.* For there were formerly, 'and lately, very sharp contests upon it, some contending 'for the freedom of commerce, some for the assertion of 'the rigours of war.'* He then divides the articles of Neutral trade into three classes: one, consisting of things immediately useful in war; one, of no use at all; and one, of a doubtful or double nature. As to the first, he is clear, that whoever supplies them becomes an enemy himself, without making any difference, like Schlegel,† between positive and general law: the second, he dismisses as furnishing no room for examination: the third forms the subject of more extended discussion. It is here that he lays down those general principles, from which all that I have adduced has been extracted and ramified: and it is here, that he explains himself more minutely on the authority of those articles of the *Consolato del Mare* that have been cited. These are his words. 'In tertio illo genere usus ancipitis, distingu-'endus erit belli status. Nam si tueri me non possum nisi

* De Jur. Bel. l. iii. 1, 5. 'Sed et quæstio incidere solet, quid liceat 'in eos qui hostes non sunt, aut dici nolunt, sed hostibus *res aliquas submi-* '*nistrant.* Nam et olim et nuper de ea re acriter certatum scimus, cum 'alii belli rigorem, alii commerciorum libertatem defenderent.'

† Exam. Impart. 60, 116.

'*quæ mittuntur* intercipiam, necessitas, ut alibi exposuimus, 'jus dabit, sed sub onere restitutionis, nisi causa alia accedat. 'Quod si juris mei executionem rerum subvectio impedierit, 'idque scire potuerit qui advexit, ut si oppidum obsessum 'tenebam, si portus clausos, et jam deditio aut pax exspec- 'tabatur, tenebitur ille mihi de damno culpa dato, ut qui 'debitorem carceri eximit, aut fugam ejus in meam fraudem 'instruxit; et ad damni dati modum res quoque ejus capi, 'et dominium earum debiti consequendi causa quæri poterit. 'Si damnum nondum dederit, sed dare voluerit, jus erit re- 'rum retentione eum cogere ut de futuro caveat obsidibus, 'pignoribus, aut alio modo. Quod si præterea evidentissima 'sit hostis mei in me injustitia, et ille eum in bello iniquis- 'simo *confirmet*, jam non tantum civiliter tenebitur de damno, 'sed et criminaliter, ut is qui judici imminenti reum mani- 'festum eximit; atque eo nomine licebit in eum statuere 'quod delicto convenit, secundum ea quæ de pœnis diximus; 'quare intra eum modum etiam spoliari poterit.'* To this must be added the long chain of historical evidence contained in his note, but which it is far too long to detail at large.

Now, upon these passages we may remark, in the first place, that no immediate mention is made of the question before us; but, that on the contrary, from the very words, *res aliquas subministrant*, and the circumstance of dividing the whole of the trade of Neutrals into three articles, all confined *to their own particular commerce*, it is clear, that their claim to a *carrying trade* had never entered his mind. It is clear, also, from the nature of the long series of examples in his note, which, although they are introduced expressly to elucidate the positions of the text, which treats, to use his own words, of the 'belli rigor, and the commerciorum 'libertas,' yet, are all in illustration of a very different ques-

* De Jur. Bel. l. iii. 1, 5, 3.

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tion indeed; namely, whether a Belligerent has not a right to interdict all commerce whatsoever between Neutrals and his antagonist. This, also, is manifestly his intention, from the sense in which his commentator Gronovius understands it; who explains the words 'commerciorum libertatem,' to mean, 'licere unicuique merces *suas* portare ac vendere ad quos voluerit.'*

In former times, that question was agitated with a great deal of heat, and without any precise settlement, in point of fact; which unsettled state lasted through the fifteenth, sixteenth, and part of the seventeenth centuries. We saw that it was set up by the English and Dutch Allies, so lately as in King William's war, against France,† but was abandoned in that more enlightened time, on account of its injustice. But, in the days of Grotius, the right was still contested, and every one of the historical examples which he records, except some of those important extracts from the Consolato, that have been cited, applies to that unsettled point alone. The question, therefore, of free ships making free goods, is not only not immediately before him, but from that very circumstance, it is proveable, I think, to a demonstration, that he had never even heard of it as a claim.

But, though the question is not before him in form, because Europe had not yet even raised it; his decision of it, as a point submitted to, and acted upon by all, without question, is abundantly to be collected; for, as has been said, he transcribes, in terms, the provisions upon it from the Consolato mentioned before, and without any comment, as a thing not to be disputed: in speaking also, in his note, of the ordinances of France, which allow the 'libertas exercendi pacatis populis,' (the mere liberty to trade with

* De Jur. Bel. l. iii. 1, 5, note 21.

† By the treaty of Whitehall, Aug. $\frac{12}{22}$, 1689, vide sup.

the Belligerent), he adds, as if it was a thing wonderful, and pointedly against the *known*, not the *disputed* law, that it was allowed to be exercised '*adeo indiscrete*, ut hostes sæpe 'sub alienis nominibus res suas occultarent.'* But in addition to this, from the mode in which he handles that other question, which we say *was* before him, it is plain that he goes a great deal farther; since not even to negative it entirely, carries the right of the Belligerent farther than those who merely negative the doctrines of the Armed Neutrality; for it is much worse to say that a neutral vessel shall not carry on his own trade with the Belligerent, than that he shall be inhibited from interposing in the trade of the Belligerent hinself.

That there are cases in which it is the opinion of this wise man, that the trade of a Neutral with one Belligerent, in articles of a double nature, may be stopped by the other, is incontestably clear from the whole frame and texture of the sentences in our contemplation. In the very outset he observes, that it will depend upon the particular state of the war: 'for if,' says he, 'I cannot defend myself unless 'by intercepting the merchandise that is sent to my enemy, 'the law of necessity will give me the right to do so, upon 'condition of restoring them, unless some other cause pre-'vent it. But if the carrying things to my enemy prevent 'the assertion of my just right, and this is known to the 'Neutral; as if I hold a place besieged, or a port blockaded; '*he shall answer to me in damages for his fault*, in the same 'manner as he who assists in defrauding me, by aiding my 'debtor to escape from prison. If he has not yet actually 'given this assistance, but only intended it, then I may de-'mand security of him for the future, by pledges, hostages, 'or in any other manner. If, however, my cause for war

* De Jur. Bel. l. iii. 1, 5 note.

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' is manifest, and he strengthen and maintain my antagonist, ' then he shall not only answer civilly but criminally for the ' mischief he occasions, as he is punished who has been ' guilty of a rescue, or screens a criminal from justice.'

Upon this strong mode of expression there has never yet been a difference of opinion. Cases may, undoubtedly, arise, and are perpetually arising, in which the application of the principles may be disputed; but the principles themselves are clear, precise, and general, and their meaning is manifest as their consequences are important. It may, indeed, possibly be urged, that the illustration he gives of the breach of a blockade, about which there is no difference of sentiment, points his assertions to one particular exigency; but, independant of the circumstance that that example is brought forward in illustration of only one of his positions; the universality in which all the rest are laid down; the tenor of these words '*status belli*,' which is a general description; of '*juris executionem*,' which is the very right to take arms; of '*pax expectabatur*,' which is a final termination of hostilities, not the surrender of the besieged place; and lastly, of '*bello confirmet*,' which is demonstrably applicable to the whole field of war: these, I say, prove him to be occupied with the general plan of operations, and the general exigencies of a state of hostility. But, above all, the marked shades of difference that appear in the injuries done, and in the measures to resist them; the rule of restoring in some cases, but of punishing in others; of taking pledges against intentions, but of vengeance against crime; remove all doubt and mystery from the subject.

Grotius, then, in the general principle altogether, and on this particular question, whenever it came before him, is as strong a champion as we can have against these new and momentous claims of the Armed Neutrality—claims which, as lawyers, we might laugh at as frivolous and new-fangled, but that we are forbidden all levity or unconcern on a subject

ject on which interests of such critical magnitude depend: interests that involve in them no less than the existence of commerce, the fortune and blood of thousands, the fate of Empires, and the universal rights of war.

The next authority which I shall mention is that of a man of no mean fame for knowledge and learning in a science in which he was the first of his time, and the representative of a great King. I mean Albericus Gentilis; the only one almost of his predecessors from whose labours (notwithstanding he blames him in many points) Grotius confessed that he derived advantage in his great work.* Stating the case of Turkish property found by their enemies, the Florentines, on board an English vessel which was neuter, he gives this opinion, without ever thinking that any doubt had been raised upon the principle, either by the laws of Nature or the pretensions of men; 'transeunt res cum 'suâ causa, victor succedet in locum victi, tenetur Etruscus 'pro toro naulo.'

Albericus Gentilis wrote in the beginning of the seventeenth century; he was followed by his contemporary Grotius, whose work was published while the reputation of Albericus was at its height: but although that work was in itself so comparatively perfect that the writings of the advocate of Spain, as he was called, were seldom afterwards consulted; yet, as we have seen, there was little or no difference between them upon the point before us. The opinions of both were adopted by the best writers of their time, during the whole of that century; by Voet,† who published some little time after Grotius; by Zouch,‡ the best English Civilian of the age; and by Loccenius,§ the

* D. J. Bel. P. Prolegom.
† De Jur. Militari c. 5, n. 21.
‡ De Jud. inter Gentes, p. 2, s. 8, n. 6.
§ De Jur. Maritimo, 2, 4, 12.

histo-

historian of Sweden, who, with his mind full of Gustavus Adolphus, the most just King and moderate Commander in Europe, confirms the *Consolato* upon this question in all its extent.

On the other hand, no writer of any sort of reputation, that I know of, or rather no writer at all is to be found, who upholds the contrary doctrine during that century. They all fly to the *Consolato* as to a land-mark with respect to the principle—as a general law, not to be overthrown, and whose overthrow, in these points, was never even attempted. Where it was attempted, in that other much greater question of the times, Whether a Belligerent might not prohibit all commerce with the opposing Belligerent; we have seen that, after some doubts about it among Civilians, and very strong opposition among States, it was confirmed and settled, as it ought to be, as a general law, though subject, like all general laws, to exceptions founded on the exigency of the case.—I have no hesitation in thinking that it was the contestation and settlement of *this* question, that has misled the Danish Civilian into the assertion, that the provisions of the *Consolato* upon the *other*, were changed, by agreement, about the sixteenth century; and that the principle I am canvassing became *paramount* in the seventeenth.

But while all the world were discussing one of these chief articles of the *Consolato*, whose soundness or unsoundness was considered with all the warm eagerness and critical acumen which strong contests and passions on both sides never fail to generate; when the real and just rights of Neutrals at last prevailed in the contest, and they were allowed the liberty of traffic, which had been disputed with them; it would have been wonderful that they should stop here, and not obtain emancipation from the *other* pretensions of Belligerents, which are now before us, could they have made it appear, with equal cogency, that they were not founded in equity and reason. This, however, was not even

even attempted; and it was long, as a principle of right, the unopposed law of Europe, while the other was always bitterly contested. The Venetians and Genoese, in the height of their wealth and maritime greatness, founded chiefly upon this very carrying trade, so far from opposing it, had joined in being the authors of the law. It was those other great carriers, the Dutch, who, feelingly alive to the causes of their wealth, saw all the advantages of an alteration, and first attempted a change. But how did they attempt it? Not by setting up a new code, founded, as it is said, *in natural justice, and supported by an Armed Confederacy;* not by pretending to a right to break all their treaties at will, because, contrary to a chimerical notion, bottomed in vain wisdom and false philosophy; but by long, laborious, and painful negotiation; by watching opportunities, and cultivating particular dispositions; by soothing particular interests, and making compensations; in a word, by the just and lawful mode of mutual contract. * Nor is it unimpor-

* Lettres et Negot. entre De Witte et Boreel, tom. i. 2, and Thurloe's State Papers, chiefly 3, 4, and 5. Whoever will take the trouble of perusing De Witt and Boreel's letters during the negotiation of the latter in France, about the year 1654, and the conferences of Nieuport, the Dutch Ambassador, in England, will find the fullest proofs of the anxiety of the Dutch Government to carry this point, as necessary to their own particular trade. 'On attend,' says Boreel, 'ici avec beaucoup d'impa-'tience quel sera le fin des negociations des Ambassadeurs Extraordi-'naires de leur H H. P. P. en Angleterre touchant le Traité de Marine. 'On espere qu'on y obtiendra la clause Vaisseau franc, Cargaison franche. 'Autrement on m'avertie de divers endroits ou l'on est bien intentionée 'pour la Republique que ce seroit un terrible contre coup pour la naviga-'tion des sujets des Provinces Unies, qui perdroient les avantages qu'ils 'retirent de charger chez toutes les Nations.' Lettre 27me Nov. 1654. Again, 'il est impossible d'obtenir le contenu de mes instructions ou il est 'dit que la franchise du Bâtiment en affranchit la Cargaison même appar-'tenant à l'ennemi: à la verité on me fait espere que des que la paix sera 'faite avec l'Espagne on ne fera pas beaucoup de difficulté,' &c., &c. Lettre 28 Nov. 1658. Nieuport underwent still more delay and mortification in England; and the negotiation failed at last. It was not till after another war, an interval of twenty years, and a change of politics in England with respect to France, that the Dutch perseverance at length prevailed, on the ground of mutual advantage in the treaty at large.

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tant to observe, that this was during a series of years in which Holland was at the zenith of its power, its military spirit, its naval resources, and its naval pretensions; when such fiery men as Tromp and De Ruyter were still more inflamed to military adventure against this country, by personal rivalry with the bravest of her heroes; and when De Witt, the ablest of his time, one of those extraordinary men whose breath seems to influence the fate of nations, and create a new order of things, was always ready to risk the whole force of his State rather than submit to the least invasion of its commerce. But he was, besides this, animated by a personal spirit against England. His power and pre-eminence in Holland depended upon the depression of the House of Orange, connected by blood, and always supported by the English Royal Family. He had formed the whole plan of his politics upon a particular set of favoured, and long-fostered maxims of national interests, amongst which this of Vry schip Vry goed was the most favoured of all; and almost all were thwarted, and many overthrown by English exertion and English laws. The Navigation Act gave a death's wound to the trade of Holland; and thus the opposers of his own and of his country's power, rivals in trade, rivals in arms, interfering every where, and fighting often with doubtful success, it is hardly in the nature of things that De Witt would not have been the first to have shewn, against England, if he could, the *natural obligations* of his maxim, in order to ground upon them the plan of an Armed Confederacy. Of such a confederacy, and of the success of its efforts, he would not have wanted an example in the conduct of his own Republic, and almost within his own time. The King of Denmark, not a great many years before, had aimed at a sort of tyranny in the Sound, by imposing what tolls he pleased, which not only fell heavily upon the trade of the Baltic, but evinced a disposition to impose of which it was impossible to see the

tent. The Commonwealths of Holland and Lubec, perceiving the danger, associated themselves together, not to attack the King of Denmark by name, but for the general protection of the trade of the North. To this union they invited various others of the Hanseatic States to accede, and at length it was strengthened by the junction of Sweden, to the full accomplishment of the end proposed.

The preamble to the first Treaty of Union was conceived in these terms. 'As of antient times, the honourable, 'free, and imperial city of Lubec, and several other towns, 'situated on the Northern and Eastern Seas, have been in 'union and amity with divers towns of the free and United 'Provinces, for the defence *of the liberty of navigation, 'trade, and commerce*, and the rights and privileges there-'unto appertaining: and as now they have found it neces-'sary to negotiate and treat concerning the renewal of the 'said Union, their deputies have consented to the follow-'ing articles:

'That this Union is not intended to give offence to any 'one, but solely for the preservation of the free navigation 'and commerce of the Northern and Eastern Seas: that 'their design is according to the Law of Nations, merely 'to assert the liberties, rights, and immunities, which have 'been granted to them in those Seas; and they will reci-'procally defend and protect one another against all those 'who molest and hinder the said freedom and liberty of 'trade.

'That by this Union they mean not to prejudice, in the 'smallest degree, their friendship with the Emperor, or the 'Kings of France or Great Britain.

'That those who shall trouble and molest their com-'merce, shall be first *requested* to desist from such conduct; 'which if they will not do, they will vigorously defend 'themselves, so that the object of the Union, and the free-'dom

'dom of navigation and commerce shall be at length se-'cured.'

The articles then go on to state the quotas of troops and vessels which each shall furnish, and various other detached regulations, in case of being driven to war.*

In April, 1614, another treaty was made, by which Gustavus Adolphus acceded to the Confederacy;† and in December, 1615, the Hanseatic Towns in general united themselves with it, to the complete attainment of their object, in the regulation of the tolls of the Sound.‡ And we have by no means an incurious precedent, in many of its stipulations, of the plan upon which the Confederacy in 1780 proceeded.

The success of this armed league between Holland and the Hanse Towns produced another, thirty years afterwards, between that Republic, and Bremen, and Hamburgh, again professing, that it was not formed to give umbrage to any one, but to defend the freedom of commerce and navigation, according to the Law of Nations, against all. The same effects followed; and, in 1645, by the treaty of Christianople with Denmark, the tolls of the Sound were regulated for fifty years, the right of search in the Baltic was confined to the inspection of papers, and many other articles of the Northern Commerce settled so as to prevent future dispute.‖

But with the effect of all these confederacies in his mind, so near in point of time to his own age, and his own very country their original instigator, it is wonderful that De Witt did not think of renewing them against England, in the same general manner, and for the same general purpose, *under the Law of Nations*, as his predecessors had framed them against Denmark. Probably he would have done so,

* Dumont Corps Dip. 10, 232. † Id. 246.
‡ Id. 276. ‖ 2 Postleth. 154.

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had he really thought that his maxim, so important to the interests of Holland, and all the North, was clearly founded in natural justice. He would have found Denmark in particular well disposed to join with him; and that he did not do so, can only be explained by the knowledge, that, interested as he was, he was yet too wise to attempt the juggle of proving to a Belligerent, that to carry the goods of his enemy for him, when he could no longer do it himself, was not to afford him assistance in the war. Accordingly, he laboured for a long time, and laboured in vain, both with England and France, in order to persuade those powers to grant by treaty, what he never thought of demanding as a right.

We are then founded in saying, that during the seventeenth century, the right to confiscate enemy's property on board a neutral vessel, was never, *as a principle*, contested, though there were frequent attempts, which were sometimes successful, to modify and change it by treaty. Still more should we be founded in thinking, that even before that time, the *principle* remained sacred amongst all Maritime States. As *Hubner*, however, has dwelt much upon historical proofs of the *liberty of commerce*, and as Vaisseau franc Cargaison franche is one of the great objects of those who quote him, we may suppose that he founds it upon these proofs, which, in times when general trading is allowed, would otherwise be totally useless; and as, besides, the new civilians dwell much upon his authority in every thing, it will not be unimportant, in a treatise like this, to examine, in the detail of his examples, not, perhaps, what it is that he means, but what is really proved.

'C'est l'évidence,' says he, 'du droit qu'ont les Peuples 'Neutres de commercer librement avec ceux qui se font la 'guerre, qui en a fait convenir les Nations Maritimes *de* '*tous les siècles*; jusqu'à ce que des vûes d'une cupidité sans bornes, ou celles d'une ambition démesurée, ont fait changer

'changer à quelques-unes d'entr'elles, si non d'avis ou de 'langage, du moins de conduite à cet égard.'*

Now, if this means merely to prove what Europe has never with any uniformity contested, and what she has now at length settled for a century and a half past, I mean the general right of Neutrals to *trade* with a Belligerent, or that neutral vessels shall not be confiscated for having enemy's property on board, England certainly is no where pledged to dispute it. But if by '*commercer librement*' it means to state from *history*, that the right set up of pursuing enemy's property into neutral ships, was the pretension alone of a 'cupidité sans bornes,' and disallowed as a principle; we deny the authority in every one of the examples adduced.

His first case is from the History of Pompey, who, he says, in the spirit of the Roman power and ambition, in the Mithridatic war, established guard ships in the Bosphorus, ordering them to intercept and to punish, with death, all those *who dared to sail thither for the purposes of commerce.* For this he refers you to Plutarch, who, when you have consulted him, tells you so different a story, that the admirers of Hubner must tremble even for his good faith. The history is, that Pompey having pursued Mithridates through Asia Minor into the Bosphorus, in which he had shut himself up with an army, resolved to reduce him by famine; for which purpose he appointed a guard of ships to lie in wait for the merchants that sailed to the Bosphorus, *having prohibited all, upon pain of death, to carry provisions or merchandise thither.*† Who these merchants were, is no where expressly stated; but from the extent and situation of the Roman Empire, at that time, it will be difficult to imagine that they were any other than those that owed obedience to Rome. But, even if they did not, Pompey had then over-

* Hub. p. i. ch. iv. sec. 7.

† Tonson's Plutarch, iv. 162.

come his enemy in every field where he had stood him; he had pursued him to the sea, whence he took measures to prevent his escaping, and where he had concerted a design, *of which he gave notice*, to reduce him by famine. Even then, if they were, or could have been, *foreign* merchants, so far in this example are we from observing the mere effect of Roman power and ambition, that we, in fact, see little more than the regular rights of a modern blockade: the difference consists in the punishment alone, and death, instead of confiscation, was the plain result of the barbarous spirit of the times.

Hubner's second case is drawn from France, whose sentiments and conduct, he says, in the preceding ages, were far more equitable upon the subject; her government never having then troubled the navigation and commerce of Neutrals with its enemies; for which he refers, as a proof, to the 42d chapter of the ordinances of 1543 and 1584, where, he says, we find regulations, conformable with the decisions of the universal code of sovereign states, on the subject. Unfortunately I have done as he directs me, and consulted these ordinances, at least in Valin's Commentary upon the III. Book, Tit. IX. Des prizes, article VII. where I find that *all ships* which are found laden with enemy's property are good prize, which, Valin says, seems to be a consequence of the 42d article (I suppose article here is the same as chapter) of the ordinance of 1543 and 69th of that of 1584, where it was laid down, that only the property found was subject to confiscation.*

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* 'Il sembloit résulter de l'article 42, de l'ordonnance de 1543, et du '69 de celle de 1584, qu'il n'y avoit que la marchandise des ennemis trouvé 'dans un navire ami qui fut sujette à confiscation sans toucher au navire ni 'au reste de son chargément; du moins c'est ainsi que Clairac avoit in-'terprété ces deux ordonnances dans son traité de la jurisdiction de la 'marine.' Art. xxv. p. 443. If Clairac could be mistaken, it is to be observed, that the only other interpretation that could be given would militate

His next example, cited for the same purpose, ends exactly in the same manner, upon recurring to his own references. It was in consequence of these principles, says he, that Queen Elizabeth testified her resentment against the Zelanders, by her ambassadors, Winter and Beal, for presuming to stop her ships destined for the ports of Spain, the enemy of Holland.* For this he refers to Camden, and Camden tells you, that 'the Prince of Orange, in hopes to 'retain his principality, ceased not to invite the French into 'the Netherlands, and permitted the Zelanders and Hol-'landers (who infested the seas round about with their *pira-'tical* vessels, being men, as it were, born in the sea), *to rob* 'the English merchant ships, whom they accused, to carry 'victuals to their enemies, the Dunkirkers, and to transport 'the merchandise of the Antwerpers and others into Spain 'under counterfeit names, which they were wont themselves 'to export formerly to their own advantage, but now durst not, 'as being conscious to themselves of their revolt. For re-'straining of these, Holstock, being sent forth again with men 'of war, took above 200 pirates, and put them in prisons all 'along the sea-coast. But to demand restitution of the goods 'they had taken, there were sent into Zeland, Sir William 'Winter, Knight, and Robert Beal, Clerk of the Council, 'to consider of the value of the things in controversy, and 'agree about restitution upon certain conditions. But, by 'reason of the avarice of the English merchants, and the in-'solency of the Zelanders, the quarrel broke out again, 'which was shortly after compounded with loss to both na-'tions.'†

militate still more strongly against the rights of Neutrals, and confiscate the vessel for carrying the goods; the remark of Valin being, that the law of 1543 and 1584 was milder, according to Clairac, than that before him, which did so confiscate the Neutral vessel. 2 Val. 252.

* 1 Hub. 77. † Camd. 214.

Now, upon this we may observe, first, that the pretence of the Zelanders was either true or false: secondly, that restitution was withheld. If restitution was withheld because the pretence was true, nothing that could happen in history, could prove with more point and weight, that the principle we contend for was amply allowed in this very example; for no one that ever heard of her, but knows the high spirit, as well as the power of Elizabeth, to resist illegal violence. If it was withheld, however, although the pretence was false, it proves the piracies of the Zelanders, but nothing at all as to the point: and it happens peculiarly, that, by the testimony of their own historian, in the very time, and in the very years alluded to, the Zelanders, from distress, and want of subsistence, occasioned by the pressure of the Spaniards, were driven to become pirates for such subsistence; eminently in this confirming the expressions of Camden, that they were permitted to *rob* the English merchant ships.*

His fourth example, by being too general, proves nothing.

The English, it seems, allowed to the Hanse Towns, that it was the right of Neutrals to traffic with Spain, but said that they had parted with this right by particular convention. At the same time it cannot be too often inculcated, that the ques-

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* 'Quand il n'y avoit point d'argent à la main, pour payer les Matelots, ni de vivres pour les nourrir, ils alloyent en mer, & y prenoyent ce qu'ils y rencontroyent. Tellement que les admiraulx, les capitaynes, et gens de marine, n'avoyent souvent rien à manger, sinon des harengs salés, ni rien à boire que de l'eau, ou de la petite biére. Les biens & marchandises, non seulement des Espaignols, mais aussi des Italiens estoyent adjugées pour bon butin, pource qu'ils envoyent (comme ennemis) des gens devant Haerlem, où estoit le regiment de la Ligue, qui estoyent Italiens. Ils prenoyent aussi tous les batteaux, qui vouloyent aller en Flandres. *Et quand la necessité les pressoit, ils prenoyent tout ce qu'ils trouvoyent & le vendoyent pour s'en ayder.* Et pource que ces facons de faire, *ne tournoyent pas à grand honneur & louange, pour les Estats de Hollande & de Zelande.* Voyla pourquoy ils s'obligerent par lettres à payer le dommage fait, comme aussi ils firent devant la fin de la guerre.' *Meteren*, 98, d.

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tion on the part of Neutrals is not concerning a general liberty to trade, but whether they may carry the trade of the Belligerent.

The next case is a famous one in our own history, on which our fondness for the memory of our great Queen has often delighted to dwell. It is her well-known contest with Dzialine, the Polish Ambassador; far enough, indeed, from supporting any position of Hubner, and, like most of the rest, falling upon himself. His account of it is, as usual, lost in generals; so that we know nothing but 'les 'obstacles que l'on mit à son commerce ordinaire avec 'l'Espagne, en declarant que c'etoit contre le droit des gens 'que les Anglois l'émpêchoient de trafiquer librement avec 'le Royaume.' What 'trafiquer librement' here means specifically is, as usual, left in the dark; and on examining the authority, which does not even hint at what sort of traffic the Poles had attempted, so as to occasion an interruption of it by the English; we are either lost in the same indefiniteness, or must come at once to the contemplation of contraband. 'For your part,' said the Queen, 'you seem, indeed, to us to 'have read many books; but yet to have little understand-'ing of politics. For whereas you so often, in your ora-'tion, make mention of the Law of Nations, you must 'know that, in the time of war betwixt Kings, it is 'lawful for the one party to intercept the *assistance and* '*succours* sent to the other, and to take care that no damage 'may grow thereby to himself. This, we say, is agreeable 'to the Law of Nature and of Nations, and hath been 'often practised, not by us alone, but also by the Kings of 'Poland and Sweden, in the wars which they have had 'with the Muscovites.'

Thus far the Queen herself. He was afterwards told by her Council, consisting, amongst others, of the two Cecils, 'that to intercept succours sent to the enemy was not 'against the Law of Nations, seeing it was ordained by

'Nature, that every one should defend himself; and this is 'not a written law, but born and bred in us. Moreover, 'that it was yet fresh in memory, how the Kings of Po-'land and Sweden have confiscated the English ships and 'merchandise, upon the bare suspicion *that they had assisted* 'the Muscovites with provisions.'* Here is the real statement of the case quoted from the authority referred to; and a case less serviceable to the cause it was meant to support, or less candidly stated by the reporter, one would think it would not be very easy to point out.

The next is an example without any reference; but it is of the less consequence, as it proves absolutely nothing to the point in hand. The Hanse Towns, it seems, at war with Denmark, exacted of the Dutch, that they would not trade with the Danes; to which they replied, as they might very fairly do, that they had a right to do so, and would not desist from exercising it.†

The seventh case is of Sweden and England. In 1653, the former having asked an explanation as to the latter's intentions with respect to Neutral Commerce, the Parliament replied to the Swedish Commissioner, that, let them abstain from warlike stores, and they were at liberty 'commercer où bon leur sembleroit.'‡ Whether this is thus exactly to be found in the reference which he gives to Puffendorf's History, (which I have searched in vain), is of no great consequence, since again the word *commercer*, the very essence of all indefiniteness on the subject, is the sole index of what is meant to be conveyed; and consequently it never can imply a right to carry enemy's property.

The same observation applies to his eighth example, where the city of Lubec, 'ayant pris la même précaution au

* Camd. 536, 7. † Hub. i. 78. ‡ Ib.

commencement de la guerre (in the time of Elizabeth), et ayant fait demander quelle sûreté elle auroit pour leur commerce et *quelles marchandises il lui seroit permis d'envoyer en Espagne*,' was told that, if it abstained from sending arms, '*et d'autres attirails de guerre*, il lui étoit libre d'y commercer avec toutes sortes des marchandises.' Upon both these cases, however, particularly the last, it is to be observed, that the very circumstance of asking what security they should have for their commerce, proves almost to demonstration, that they did not consider even general trading as a matter of right then settled in the Law of Europe, as it since has been. Much more does the question, 'What sort of goods they should be allowed to send to 'Spain,' prove, that in all such cases as these the word *commercer* never means, nor is intended to mean, a right to the enemy's carrying trade.

The ninth example is merely of the same nature with the others. Sweden, in its war with Russia, seized English vessels bound to Livonia. The English protested against it, because they had a right, being Neutral, to trade with Belligerents.

But I think the summit of Hubner's mismanagement, in regard to historical proofs, is reserved for his tenth and last case:—a case relied on (but to me most strangely) by all the innovators upon the Law of Maritime Capture, because, as I suppose, it springs from England, and is argued with England. Whether it is decided against her, take Hubner's own account of what was decided, consult the authority, and see how it applies. In this example he asserts, from the *Exposition des Motifs*, &c. that Lord Carteret and Lord Chesterfield, Secretaries of State at different times, declared to the Prussian minister, that the subjects of his country might every where continue their commerce, provided they abstained from contraband and breach of blockade; *and that, as to the rest, the trade of Neutrals should remain upon the same footing as it*

was in time of peace; and he refers to the second, third, eighth, and ninth articles. It is to be recollected also, that the contest in the Exposition des Motifs is chiefly, and almost solely, confined to the question of the right of carrying enemy's property.—Thus far the statement; now observe the truth.

In the first article, the real question asked by the Prussian agent is, to be informed from the English Ministry, *of what specifically was held contraband with them;* and whether grain, timber, planks, hemp, linseed, linen, and the like, were comprehended therein, *that the King might advise his subjects thereof, and give them the necessary instructions upon the manner in which they should continue their commerce.**

The second article (the first referred to by Hubner) contains the answer: That the King's flag should be respected *equally with that of other Powers in the alliance of Great Britain*, excepting only such vessels as should carry warlike stores to the enemies of the British nation.

The third article (also referred to) certainly contains the statement; as far as 'that commerce should remain free to 'Neutral Powers;' but the important words, 'upon the 'same footing as in times of peace,' are contained under an explanatory N. B. apparently by the Prussian ministers themselves.

'That, for the rest, the commerce should remain free 'to the Neutral Powers;—*N. B. upon the same footing as in times of peace.*'†

In the eighth and next article referred to, however, Lord Chesterfield's answer is, that the King of Great Britain will offer no hindrance to Prussian navigation; *so long as they should exercise their commerce in an allowable*

* Exposit. des Motifs, &c. Art. I. † Ib.

way,

way, and should conform to the ancient customs established and received between Neutral Powers.

The ninth article merely reiterates Lord Carteret's declaration.

Upon these articles it is scarce necessary to point out, that although the question in the Prussian exposition directly concerns the *carrying trade*, the questions to the English Government, and the answers of its Ministers, upon which the exposition is emphatically founded, do not in the least, much less specifically, relate to it. Supposing even the N. B. at the end of the third article to be Lord Carteret's own explanation, it can never mean to relate to more than the question originally put, which was the basis of all these other explanatory questions. This we see, in terms, was nothing more than to know, *what was held contraband by the English Ministry*, in order that the subjects of Prussia might tell by what rule to direct their trade. Lord Carteret's answer must, therefore, relate to contraband, and contraband alone; for it would have been strange if he had voluntarily granted more than was asked; and strange, indeed, if he had granted what England had uniformly, except by treaty, denied to all the world. This is the more clear, because, when general complaints, and a more general question, seem to have been put afterwards to Lord Chesterfield, the answer then is, that certain things are granted, so long as *they should exercise their commerce in an allowable way, and should conform to the ancient customs established and received between Neutral Powers.*

To put the matter, however, out of doubt, if doubt can yet be entertained; take the Sieur Andrie's, one of the Prussian Ministers, own confession, as to the law, in a letter to the King of Prussia himself, pending this controversy with the Court of London. 'Your Majesty's subjects 'ought not to load on board neutral ships any goods *really* '*belonging to the enemies of England*, but to load them for 'their

'their own account, whereby they may safely send them to 'any country they shall think proper, *without running any* '*risk*: then, if privateers commit any damage to the ships 'belonging to your Majesty's subjects, you may depend on 'full justice being done here, as in all the like cases hath 'been done.'*

And so much for the historical examples adduced by the great champion for Neutrality, to prove that the maxim, that free ships make free goods, has always been acknowledged by Europe. That they must have been adduced for this purpose, or no purpose at all, is, I think, clear, because a general trade, on the part of Neutrals, with Belligerents, has, in the last century, always been allowed, notwithstanding all the contests concerning it that occurred in the preceding ages. It certainly was not denied by Great Britain, at the time when complaint was most loudly sounded against her in the war of fifty-six, about which time Hubner wrote; and why he should otherwise have recurred to examples (how accurately, however, we have seen), to prove what was not resisted, in a work which professed to vindicate Neutrality from its injuries, I am wholly at a loss to conjecture. It is, however, the clearer, that this must have been his meaning, because this chain of examples is introduced in the very chapter, and immediately after he had laid down their right, even to the colonial trade of Belligerents, whenever they chose to let them into it; and in various preceding parts he is strenuous in the assertion, that their rights of commerce are the same (with the exception of contraband) with those which they had enjoyed in times of peace; and as in times of peace no one could question their right to such carrying trade, as any nation chose to allow them, the consequence is inevi-

* The genuineness of this extract is certified under his hand by Michel himself, the other Prussian Minister, when it was exhibited in a cause. D. of N.'s letter, in 1 Magens, 494.

table,

table, that Hubner really thought the examples which have been detailed bear him out in the assertion, that free ships make free goods. Schlegel, the pupil of Hubner, understands this to be the object of his book, although it treats merely of the general freedom of neutral commerce, and he does not hesitate to assert, (we will suppose not upon the faith of this historical research) that he has developed the rights of the Neutral in a manner so convincing, that those versed in the law of nations 'ont depuis presque unanimement 'reconnus la justesse de cette axiome que le pavillon neutre 'couvre la marchandise.'* In vain, however, I think has history been consulted, at least in the instances given by this most strenuous advocate of Neutrality: in vain have authorities been sought for to wrench the true bearing of facts, and the true meaning of language, into the support of a principle, which, except by the stipulations by treaty, has not, in point of truth, been ever supported during the ages we have been examining. The uniform experience of Europe, in those times, where treaty did not interfere to change the effect of the principle by positive contract, determines, beyond all doubt, that the principle itself was never brought in question.

When I say this, however, let me not appear to be ignorant of what I know has often been asserted; let me not seem to avoid what I wish thoroughly to examine. Amongst those who support the maxim as founded in natural right, a name is said to be enrolled of such great and weighty authority, that, if it is really so, the reasoning that has been adduced will require still greater defence, in order to stand unshaken. It is of no less a man than Puffendorf, himself a tower of strength upon any question of the Law of Nations, which he has really espoused. The sensible Barbeyrac, in his commentary upon his great work upon the Law

* Schlegel, 10.

of

of Nature and Nations,* has preserved a letter of his upon the subject of Neutral Commerce, which has often been cited by those who support the maxim in question, as proving that Puffendorf is entirely of that opinion. If we examine it with common attention, it will be found precisely in the same situation with those historical examples of Hubner which we have just been examining; either amounting merely to the assertion that, as a general rule, the Neutral has a right to trade with the Belligerent, which, it cannot be too often reiterated, no one denies him; or, amounting absolutely to an authority against the maxim, in support of which it is cited.

Let us hear Barbeyrac himself in introducing it into his notes, 'Au reste pour ce qui regarde la question, *si l'on peut* '*empêcher que les peuples Neutres ne trafiquent pendant le* '*cours de la guerre avec notre ennemi*, il y a une lettre de 'notre auteur, &c. &c.'†

It is to be observed, that Puffendorf no where entertains the question of Neutral Commerce in his works; but, what is most important in this particular enquiry to know, refers you, with full approbation, to the opinions of Grotius in the passages that have been cited at length.‡ The letter was written to Groningius, whom Schlegel calls 'fameux 'jurisconsulte,' in King William's war with France, at the end of the seventeenth century. This civilian had undertaken to assert, I know not what claims on the part of Neutral Nations, but amongst them this of a right to trade generally, which no one now withholds; but which then, as we have seen, was particularly disputed by the Treaty

* L. viii. c. 6. † Puff. D. des Gens, l. viii. c. 6. notis.

‡ 'Au reste si l'on veut savoir en quoi consistent ces tempéramens aussi bien que l'etendue des droits de la guerre, et par rapport à l'ennemi, et par rapport à ceux qui lui fournissent quelque chose; *on trouvera la dessus amplement de quoi satisfaire* dans le traité de Grotius au troisieme livre.' Ibid.

of Whitehall.* Now, this particular circumstance, together with those others just now mentioned, of Puffendorf's approbation of Grotius upon the subject, and the very words of Barbeyrac in introducing the letter, let us at once, I think, into the true question that was before Puffendorf when he wrote, which seems thus solely to have been confined to the pretension of England and Holland to cut off all trade whatsoever with France. With this guide to our minds in examining this important letter, let us proceed to look at the letter itself.†

'L'ouvrage, Monsieur, que vous promettez, touchant la Liberté de la Navigation, excite ma curiosité. C'est un beau sujet, et sur lequel personne, que je sâche, n'a encore fait de traité particulier. Je crains bien néanmoins d'en juger *parceque vous touchez dans vôtre lettre, que vous ne trouviez des gens qui vous contesteront vos idées.* La question est certainement du nombre de celles, qui n'ont *pas encore été établies sur des fondemens clairs et indubitables*, qui puissent faire regle par tout le monde. Dans tout les exemples, qu'on allegue, il 'y a presque toûjours, quelque *chose de droit, et quelque chose de fait.* Chacun d'ordinaire *permet ou defend le commerce maritime* des Peuples Neutres avec ses ennemis, selon qu'il lui importe d'entretenir amitié avec ces peuples, ou qu'il se sent de forces pour obtenir d'eux ce

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* Vide supra.

† As to the other claims, whatever they were, which Groningius meant to set up, it is as in vain to enquire after them, as that they should derive any weight from their author: since we are told by Barbeyrac himself, that being 'compilateur de trés mauvais goût les exemplaires *de sa rhapsodi* sont servi aux *épiciers et aux heurrieres* et par là sont devenus rares.' Puffend. viii. 6. notis. It is curious, after this, to hear Hubner's lamentation in the moment of telling you that Neutrals ought to be allowed to trade with Belligerents upon the same footing as in time of peace. 'The Baron Puffendorff,' says he, 'has written a short letter upon this question, which I have never seen. It ought to be in a book called Groningii Bibliotheca Universalis Librorum Juridicorum, and in the 105th page, *but I could not find the book at Paris.*' Hubn. i. 66.

qu'il

qu'il souhaite. Les Anglois et les Hollandois, peuvent dire *sans absurdité*, qu'il leur est permis de faire tout le mal qu'ils peuvent aux François avec qu'ils sont en guerre, et par conséquent d'emploier le moyen le plus propre à les affoiblir, qui consistà traverser ou empêcher leur commerce: qu'il n'est pas juste que les Peuples Neutres s'enrichissent à leurs depens, et en attirant à eux un commerce interrompu pour l'Angleterre et la Hollande, fournissent à la France *des secours pour continuer la guerre:* d'autant plus que l'Angleterre et la Hollande, favorisent ordinairement d'une autre maniére le commerce de ces peuples, et leur donnent occasion de transporter et débiter ailleurs les marchandises de leur cru, ou de leur fabrique: en un mot, qu'on veut bien leur laisser en son entier le commerce qu'ils ont accoûtumé de faire en tems de paix; mais qu'on ne doit pas souffrir qu'ils l'augmentent à l'occasion de la guerre, au prejudice des Anglois et des Hollandois. Mais comme cette matiére du commerce et de la navigation ne dépend pas tant de regles fondées sur une loi generale, que sur les conventions particulieres entre les peuples: pour pouvoir porter un jugement solide de la question dont il s'agit, il faut examiner avant toutes choses, quels traitez, il y a eû la-dessus entre les Rois du Nord, et l'Angleterre ou la Hollande, et si celles-ci leur ont offert des conditions justes et raisonnables. *D'autre côté néanmoins si les Rois du Nord peuvent maintenir leur commerce avec la France, en faisant escorter les vaisseaux marchands par des navires de guerre, pourvu qu'il n'y aît point de marchandises de contrebande personne n'y trouvera à redire:* la loi de l'humanité et de l'equité entre nations, ne s'éntendant pas jusqu'a exiger que, sans aucune necessité, un peuple se prive de son profit, en faveur d'un autre. Mais *comme l'avidité des marchands est si grande, que, pour le moindre gain, ils ne font aucun scrupule d'aller au de la des justes bornes:* les Nations, qui sont en guerre, peuvent faire visiter les vaisseaux des Peuples Neutres; et, s'il s'y trouvé

des

des marchandises defendues, les confisquer de plein droit. D'ailleurs, je ne suis pas surpris que les Rois du Nord aient plus d'egard à l'intérêt general de toute l'Europe, qu'aux plaintes de quelques marchands, avides de gain, qui ne se soucient pas que tout aille sans dessus dessous, pourvû qu'ils satisfassent leur avarice. Ces mêmes Princes jugent sagement, qu'il n'est pas à propos pour eux de prendre des mesures précipitées, pendant que d'autres peuples travaillent de toutes leurs forces à reduire dans un etat de juste mediocrité cette puissance insolente, qui menace de mettre toute l'Europe dans ses fers, et en même tems de ruiner la Religion Protestante. Ce qui etant aussi de l'intérêt des Couronnes du Nord, il ne seroit ni juste, ni raisonnable, que, pour un petit profit a tems, elles troublassent un dessein si salutaire, dont on tâche de venir à bout sans qu'il leur en coute rien et qu'ils courent aucun risque,' &c.

Upon this letter it is to be observed preliminarily, that although the question was concerning the right to inhibit all traffic whatsoever, (certainly the carrying trade is never once mentioned or glanced at), yet he tells Groningius that he would find many who would dispute his 'positions; 'that Great Britain and Holland could say, without absur- 'dity, that it was allowable for them to do all the mischief 'they could to France, and to employ the properest means 'of weakening her, which was to interrupt or prevent her 'commerce: that they might say, without absurdity, that 'it was not just for Neutrals to enrich themselves at their 'expence, and, at the same time, furnish France *with the means of continuing the war*; particularly as they allowed 'them to enjoy such commerce as *they had possessed during* '*peace*, but which they ought not to suffer them to augment '*on account of the war*, and to their own prejudice.'

Possibly the reader will advert to the very great support which, thus far, this great master of the Law of Nations gives

gives in these passages, to the reasoning that has been before him. How these passages, at least, can seem to militate against that reasoning it will not be very easy to demonstrate. But he goes on to state, that as commerce and navigation do not depend so much upon general law as particular conventions, it will be necessary to examine them, in order to see whether the English and Dutch have come to a just and reasonable agreement with the Kings of the North. Here, then, he seems to found the right to trade itself upon treaty; certainly, at least, there is nothing here against our positions.

It is the next paragraph, however, which, it is conceived, is hostile, because he says, that if, after all, the Northern Powers can maintain *their* commerce *with* France, by means of convoys of vessels of war, provided they abstain from contraband, no one has a right to question them for it, the laws of humanity and equity not requiring that a people should deprive themselves of any advantage in favour of another, without any necessity for so doing.

Upon this the obvious remark is that, even upon the question of prohibiting all trade, where there is a necessity for so doing, in this very passage it is allowed that it ought to be done; and the only point, therefore, is, to establish a case wherein the necessity may be made to appear. That case it has been the object of the preceding pages to demonstrate, when Neutrals interpose in the carrying trade; an interposition pregnant to the full with as much mischief, and decisive of as much partiality, as the trade of contraband itself; equally, therefore, open to the strong observation in the letter before us;—'But since the greediness of 'merchants is so great, that, for the least gain, they make 'no scruple to overleap *the bounds of justice*, Belligerents 'have a right to search the ships of Neutrals, and, if they 'find prohibited merchandise, to confiscate them as fair 'prize.'

Now

Now, I own, from the whole of the context taken together, I can see nothing that would produce conviction, that Puffendorf, so far from being the champion of the Neutral pretension, is not directly in favour of the Belligerent claim. He allows we have seen that the two allied powers may hold, without absurdity, the very language that we have been holding; he foresees that many will oppose the assertions of Groningius, though part of his object was to pull down a pretension in that war, which was so confessedly unjust as to be abandoned by the allies themselves; above all, he allows the necessity of checking the unbridled avarice of merchants, whose contempt of justice, in their eagerness for gain, is such, that he gives to Belligerents the full rights of search and confiscation. This concession also immediately succeeds the only sentence in the whole letter, or indeed in all the works of Puffendorf, which glances at any thing like a support of the Neutral claim. But in addition to this, much is to be observed upon the terms of that sentence itself. It is by no means unqualified or unmixed; the important ingredient of a *national convoy* is too prominent not to engage our attention; and if this is made necessary in the mind of Puffendorf to the enjoyment of the privilege, the whole claim, in the case of private ships, must be abandoned at once.

This, however, could by no means be the intention of so true a reasoner. Convoy may, possibly, *if so settled*, be allowed to dispense with certain forms in the exercise of a right, but can never do away the whole right itself. The presence of a ship of the State, it may *be settled by agreement*, shall *imply* that the vessels and cargoes under convoy are innoxious; but can never, if they are noxious, render them not so; never turn mischief into harmlessness, crime into innocence. If the right itself, therefore, is unsupportable, it is not the circumstance of convoy that will support it. This is so clear, that it must make its way into the

most obtuse understanding; and we can never suppose, that the fine mind and learning of Puffendorf could ever intend to broach a position so replete with absurdity. If it means any thing as to the maxim we are discussing, it must mean openly and boldly to assert, that Neutrals have the right by the law, but, being contested to them *by force*, that they may oppose that force for the enjoyment of their rights. However, that it cannot mean this, I think is clear, from what has already been cited from the preceding parts of the letter, where the claims of the allied Belligerents are acknowledged in full force. That other construction alluded to, that it applies to points of form, and dispenses with search, has, I know, been put upon it; but, meaning to discuss that question in its proper place, I shall not entangle the subject with it here. One farther, and not unimportant observation, however, must be made, that, even upon this very point of convoy (whatever it means), the sentence is conceived in these particular terms: that it is to be employed to maintain *their* commerce *with* France; not the *enemy's* commerce, nor *for* France. This, coupled with the historical circumstance which must always be borne in mind, that the allies had, during that very war, pretended to prohibit all trade whatsoever with their enemy, elucidates the mystery that hangs over the subject, and puts the matter beyond all doubt. It proves, I think, that Puffendorf *hesitated* whether even this was not a proper pretension of the allies; but that, if the Neutrals, who had a conflicting pretension, of perhaps a superior nature, chose to maintain it by force, he could see nothing to prevent its assertion. It never can be strained, however, to mean that they had a right to the carrying trade which they had never possessed before, and which would not be *with*, but *for* France. Now this carrying trade is the very point in discussion, that free ships make free goods; and thus, upon the whole, if Puffendorf's letter is any authority upon the sub-

ject, it is authority in favour of the Belligerent, not of the Neutral.

And thus we have done with this celebrated letter, the only authority that has ever been even glanced at to prove, that in the seventeenth century the maxim in discussion had ever been laid down as a principle founded in natural right.

What, however, shall we say (if any doubt can yet hang upon this opinion of Puffendorf) to the authorities of two men, nearly his contemporaries, co-ordinate in point of rank and authority as civilians, equal in point of reputation, and who both affirm, in terms the most authoritative and unequivocal, that the pretension is unjust. I speak of no less men than Bynkershoek and Heineccius; the one a Dutchman, the other a Prussian; each of them, therefore, of countries interested in sinking the foundation of the maxim as deeply in the Law of Nature as the Armed Neutrality itself. Each of them, however, determines otherwise.

In the fourteenth chapter of the Questiones Juris Publici, Bynkershoek entertains the question, '*De hostium rebus in 'amicorum navibus repertis.*' In this, he says, two things are to be examined: first, Whether the neutral ship itself is confiscable for fault, in carrying enemy's property? next, Whether the property so carried is confiscable? As to the first, after canvassing many doubts, which have before been alluded to, in the writings of Grotius and Loccenius, in times when the law upon the much larger claim of Belligerents was not so well settled as it is now; he decides, as the world now decides, that the ship itself is not confiscable. With respect to the other, his opinion is as clear as his language is emphatic. 'Why,' says he, 'do you doubt, since I have 'a right to seize my enemy's goods wherever I find them?' But there are various treaties between Holland, and France and Spain, in which the contrary rule is allowed; and, therefore, either the old law of France is abandoned, or, '*quod est verius,*' the treaties are exceptions. Whichever

way it is, our business is more with the reason of the thing than with treaties (de ipsa ratione magis quam de pactis laborandum est); and, reason being consulted, I see nothing to prevent my seizing an enemy's property, even on board a neutral ship, *by the just laws of war.* You will, perhaps, tell me, that I cannot seize the goods, without first possessing myself of the ship; which cannot be, again, without invading her neutrality. But I have a right to stop even a neutral vessel, in order to ascertain that I am not deceived by false colours; I have a right also, for the same purpose, to examine her papers, and the papers relating to the cargo as well as to the ship: and if I find that they disclose the property of an enemy, I take possession of it by the right of war. This is clearly allowed by the law of Holland, and by the *Consolato del Mare.* I, however, do not assent to the accompanying concession in the *Consolato,* concerning freight, which, not having been earned, ought not to be allowed.'—These are the sentiments of a man of the very first authority in the law; a man, whose admirable sense sifts the bottom of every thing he examines; a man, in short, whom Barbeyrac sometimes prefers even to Grotius himself.

We must not quit this account of Bynkershoek's opinion, without remarking upon the support which he gives to the next authority I mean to cite. 'After I had written 'this,' says he, 'the book of the illustrious Heineccius 'came into my hands, in which he treats upon this sub-'ject: far from finding in it any thing to make me change 'my opinion, it is rather corroborated, by the authority of 'that great man.'*

Let us now come, then, to the investigation of this authority. It is to be found in that treatise of Heineccius which

* Quest. Jur. Pub. cap. xiv. ad fin.

examines

examines questions of confiscations for carrying prohibited goods.* The eighth section treats of precisely the same questions with those touched upon by Bynkershoek; and after considering them pretty nearly in the same manner, he comes to the same conclusion. It is to be observed, however, that although he sets forth the articles of the *Consolato del Mare*, which seems to have all his approbation, and, consequently, approves the right of seizing enemy's property on board a neutral vessel; yet he entertains a question upon all those points regarding the confiscation of the vessel for carrying it, and the power itself of trading at all on the part of the Neutral; which, as we have seen, were so long undecided in Europe. After mentioning the Consolato, he observes, 'non semper tam humanæ sunt leges 'tempore belli propositæ,' and then states a variety of cases, which all the old civilians had made use of before: 'Ex quibus,' says he, 'satis adparet vere omnino dixisse 'Grotium, non certam ea de re esse juris gentium legem.'† After distinguishing, however, several different cases, and determining, as we have allowed, that modern ages have most justly determined, he treats the question before us as if it never had been in doubt: 'Idem statuendum arbitramur, 'si res hostiles in navibus amicorum reperiantur. Illas capi 'posse, *nemo dubitat*, quia hosti in res hostis omnia licent, 'eatenus, ut eas *ubicunque repertas* sibi possit vindicare.' The ship, as has been observed, he restores to the Neutral, who was not forbidden by any law from taking them on board, in the same manner as the Belligerent is allowed by law to seize them, when found on board; and he gives the whole common sense of the question in his concluding sentence: 'Quemadmodum ergo jure suo utuntur, qui res hos-

* De Navib. ob. Merc. Vetit. Vect. Commiss.
† Id. Cap. ii. Sec. viii.

'tium ex istis navibus auferunt; ita et injuste non faciunt 'qui amicorum res navibus suis vehunt.'

For the sake of the true reason, and the real justice of the case, one could wish that the regulation, which was made some few years after this, in the ordinances of the French Marine, had been founded on such authorities as the last. However, the motive of the King of France was still honourable, when he, for the first time, adopted the humanity of the *Consolato* in relaxing the ancient rule of France. He did this in order, as he says in the regulation, 'to preserve the good faith of the treaties which he had 'entered into,' not on the ground of general equity. Before the regulation, therefore, of 1744 the French Marine had not yet departed from the old *contested* Law of Europe respecting general trade with Belligerents; and their confining themselves to the seizure of enemy's property alone was matter of lenity and improvement.*

And here, we close the account of the authorities upon this debated question, from the eleventh to the middle of the eighteenth century; during which long period, as far as can be judged from the positive evidence produced in its favour, and the little force of that evidence which is produced against it, the remark which was made in the outset of this section is confirmed, that the stream of the authorities is against the principle of the Armed Neutrality. I think we are nearest the truth in saying, that thus the matter rested until the middle of the last century, when, for the first time, Europe saw those principles of trade, which had been for a long time forcing themselves into practice by the express stipulations of treaty, contract, and convention, at length boldly brought forward as a matter of general right, founded, as the Armed Neutrality of 1780

* See the Reglements of 1704 and 1744, 2 Valin, 248, 250.

said,

said, in natural justice, and, as the Armed Neutrality of 1800 says, in the indissoluble ties of natural law. In consequence of this, it was no longer necessary for Maritime States to look to their treaties for the line of their duty, or the foundation of their privileges; but the convenient theory of right set up, rose far above all law; and by seeking the divine origin of reason, equity, and the general rights of mankind, endeavoured really to persuade Belligerents, that a Neutral might interfere in the war before their faces, and screen their enemy under his cloak, at the moment when he might be falling within their power.

These privileges, founded on right, were first claimed by the King of Prussia in the war of 1745, and were developed at large in his minister's memorial to the Duke of Newcastle, 1752.

That memorial disclosed the real pretensions of the Monarch by whose orders it was framed in the style which it assumed;* from which might be collected, in fine, all that the King of Prussia found it convenient for himself to do, although in defiance of all that any King in the world had attempted in the same circumstances. The Courts of Admiralty in this country having, it seems, borne hard upon his subjects for bad conduct under their profession of Neutrality, he chose himself to try the matter over again by a Court of his own; and, as might be expected, that Court having discovered that his subjects were in the right, he proceeded to carry its sentence into execution, by immediately, and of his own authority, in the manner of reprisals, cancelling the large debt of his new conquest of Silesia to

* Exposition of the Motives founded upon the *universally received Law of Nations*, which have determined the King of Prussia, upon the repeated instances of his subjects trading by sea, to lay an attachment upon the capital funds which his Majesty had promised to reimburse to the subjects of Great Britain, in virtue of the peace treaties of Breslau and Dresden. See 1 Magens, 437.

the merchants of England, until the claims of his own subjects were satisfied. The mockery of setting up a tribunal of his own, to review the sentence of the only tribunal acknowledged in point of fact by the Custom of Nations, whatever arguments particular persons may have thought of weight against it in theory, it is needless to expatiate upon, the question of the competent jurisdiction not being now before us; but in order to shew the proper qualifications of this new tribunal, a new law was absolutely broached, and Europe, for the first time, saw, in the following abridged questions, the embryos of the Armed Neutrality.

I. Whether Belligerent ships could stop Neutrals on the high seas, search, or carry them into port, notwithstanding, from the exhibition of papers, that no contraband was on board?

II. Whether they could detain them under pretext that they carried enemy's property?

III. Whether the Courts of the capturing Belligerent are competent to decide upon the legality of the capture?

IV. Whether the King could not confiscate the Silesian debt by way of reparation for the long delay of justice, and the unjust decisions of these Courts?

And thus, after near six hundred years silence in Europe upon this great question as a principle in the Maritime Law, during which time almost every other principle had been started, canvassed, resisted, or confirmed, amidst the thousand revolutions of commercial states; after the very question itself had long been agitated with the greatest urgency as a point of *convention* between particular nations; it was at length fairly put forth in form, as a right belonging to all nations, claimable from nature and not from agreement, and by consequence so far superior in obligation, that treaties on the subject were to change their object, and stipulate, where change was necessary, the *reverse* of the principle, instead of the principle itself.

England

England saw with astonishment this open and bold design to overturn all the received principles of her maritime rights and duties; and prepared to resist them, both by the firmness of her conduct and the soundness of her reasoning. At that time there were at the Court of London four illustrious men, learned in the laws of their country and of the world, of great integrity of life and faithfulness in all matters of representation. One of them was a judge of the realm in all matters of civil and public law, the rest the highest law-officers of the Crown. To these was confided the important charge of examining the argument by which such unheard of pretensions were to be supported, and to ascertain whether or not all Europe had been in a dream, when, in compliance with the authority of all her wise men, and the example of all her States, she had for so many ages admitted the contrary principles as received law.

The answer which these learned men gave to all the propositions laid down by the Prussian Minister, is so well known to England, and so widely disseminated in Europe, that it is needless to repeat it. In this historical part of the argument, it is sufficient to say, that those excellent persons, to whom his Majesty had confided the defence of the maritime rights of his kingdom, most amply justified the confidence that had been reposed in them; by furnishing an answer to the Prussian allegations of such force and authority, that the maritime law of Europe, for this time at least, stood unshaken. Whether it can stand the shock of the pens of Hubner and Schlegel, supported by the fleets and armies of such great and mighty kingdoms as are preparing for the contest, remains to be seen. Only thus much we may observe; that if the Northern Confederacy should even succeed by the force of power to *change* the law, as we say it has stood for ages, that change will not be brought about by altering the principle, but by a convention not to obey it. The nature of the laws of Reason and Equity,

Equity, and the writings of those learned men who have developed them, must always remain the same; whatever injuries they may sustain from ignorance or violence. As a general rule, whenever the subject is considered in the abstract, the old opinion must ever prevail; and though confederacy should arm after confederacy, and treaty should succeed to treaty, until the fact actually happened, that every Maritime State of the world should agree to be bound by a different law; still the rule itself, if properly founded, would be impregnable and unassailable, whereever first principles are concerned. At the time we are treating of, Europe was so little prepared to deny this, or, what is more, to deny that the conduct of the preceding ages, and the writings of the Civilians, had been grounded entirely upon these first principles; that the Duke of Newcastle's letter, containing the answer to the Prussian Minister, was then considered, and will, I trust, ever be considered by dispassionate and disinterested persons, as a masterpiece of true and general law. Thus, at least, it was held by the greatest men of that time. Vattel, in speaking of the jurisdiction of courts in the countries which erect them, observes, that for another country to attempt to set aside their definitive sentence, is to attack the jurisdiction itself; on which account no prince ought to interpose in the causes of his subjects when in foreign countries; adding, by way of farther proof, 'le Cour d'Angleterre à 'établi cette maxime avec beaucoup d'évidence à l'occasion 'des vaisseaux Prussiens saisis et declarés de bonne prise pen-'dant la dernière guerre.' And in the note upon this passage, he calls it, 'Un excellent morçeau de Droit des 'Gens.'* To this testimony of Vattel, we may add, in another country, that of Montesquieu; who, speaking of it

* Droit des Gen. l. vii. 84.

in

in a private manner, as a mere literary man, in one of his familiar letters, says, it is considered as '*Reponse sans 'replique.*'* There are, however, still stronger and irrefragable proofs of its general merit, its soundness of doctrine, and cogency of conclusion, in the conduct of Frederick II. himself. We have seen that his own minister at the Court of London had abandoned it as far as the principle immediately before us was concerned;† and this probably, together with the force and weight of the answer in the minds of the different public men of Europe, induced him not to renew the subject. Certain it is, that not only these pretensions were never afterwards heard of, as founded in principle, until the Armed Neutrality of 1780; but the king of Prussia gave the most convincing proofs of conviction, by relinquishing the immediate pretensions for which he had directed the Exposition des Motifs to be prepared. The interest of the Silesian loan was no longer withheld, but from that time regularly discharged.‡

After all that has been said, therefore, of the history of the law in Europe; the uniform acknowledgment of the principle of the *Consolato*, whenever it was not modified by treaty; the constant, regular, and strong support which it met with from the writings of Grotius, and the conduct of De Witt; the approbation of all the other writers of the seventeenth century; the unqualified renewal of that approbation by Bynkershoek and Heineccius, at the beginning of the eighteenth; the praise of the answers we have been reviewing, from such men as Vattel and Montesquieu, in the middle of it; and the final acknowledgment of its force by the conduct of the party himself to whom it was addressed; after all this, I say, what are we even to at-

* Lettre 45, à l'Abbé Guasco.
† Andrie's Letter, vid. supr. p. 57.
‡ 12 Smollet, 132.

tempt

tempt to make of such language as this on the part of the Danish Professor?

'Le Gouvernement Anglois repondit par une consultation 'de quatre jurisconsultes qui defendoient les jugemens 'contestés par le régle anciennement adoptée par le *Con-* '*solato del Mare.* On s'etonnait *alors* de ce que le gou- 'vernement et les jurisconsultes Anglois au lieu de suivre 'le progrès des lumiéres se trouvoient en arriere de plus 'd'un siécle dans la science du droît des Gens.'*

What these *lumiéres* were, by the progress of which we ought to have been governed, it would not be difficult to guess; but, unfortunately, the *lumiéres* of that time were all on the side of the Belligerent Powers; for in the very next war, not above five years after the Exposition des Motifs and its answer appeared, the same principles as were then acted upon by England, were acted upon both by England and France, to the destruction of Neutral interposition, and with it, perhaps it must be owned, in some instances, to the destruction of their just rights. The confiscations of whole fleets, almost, of Dutchmen, on the part of Great Britain; and of Danes, on the part of France; and the consequent discontent, remonstrances, and urgent memorials from the merchants to their Governments, are still, perhaps, in the memories of many at this moment alive. Deputation after deputation, in Holland in particular, was sent to their magistracy; and there appeared, at one time, a memorial signed by 269 of the principal merchants, stating their supposed grievances and cause of complaint; in which, no doubt, many real injuries were intermingled with cases of resistance to injury. They even went so far in this memorial, as to offer themselves to contribute a contingent, and to arm, at their own charge, for the protection of their insulted commerce. But, al-

* Schlegel, 9.

though

though great and just complaint was made of particular acts of robbery, cruelty, and insolence, on the part of the English privateers, for which the memorials of our Ambassador himself confessed there was but too much foundation;* although the defence of our own Belligerent rights carried along with it such frequent attacks upon the fair rights of their neutrality, as to excite the indignation of our own Government, and even of individuals here, who, to their honour, associated to offer rewards for the discovery of the perpetrators; although, also, there was a great and sharp contest on the interpretation of the Maritime Treaty with Holland; yet, amidst so many opportunities, so many direct or incidental occasions to broach the maxim in question as a matter of natural right, that pretension was never asserted; but all was rested upon convention, contract, and custom, and that, not as the conventional or customary law of Europe, but as the mere positive agreement of the two individual States. On the other hand, the British Minister, while, as we have observed, he admitted the too frequent instances of unjust violence on the part of privateers, never once relaxed in the loud assertion of our Belligerent claims, to prevent the Dutch from pretending, under false interpretations of the treaty, to carry the colonial trade of France. 'His Majesty,' says one of those dignified memorials, 'is at war with the most Christian King; he cannot 'hope to get out of it with safety, or obtain a speedy and 'lasting peace, which is his Majesty's sole aim, if the 'Princes who have declared themselves neuter, instead of 'contenting themselves with trading as usual, without any 'risk, assume a right of carrying on that trade with the 'King's enemies, which is not allowed them in times of 'peace. His Majesty sees with pleasure the trade of his

* See Sir Joseph Yorke's Memor. to the States Gen. 22d Oct. 1758. An. Reg. 1758.

'neighbours

'neighbours flourish, and would behold its increase with sa-
'tisfaction, if its prosperity were not repugnant to this
'primary law.'*

In those days, when the spirits of men were hottest against us, there came out at Amsterdam another *Exposition* upon the subject of the disputes between Holland, as Neutral, and Great Britain, as Belligerent. But, unlike the former Exposition on the part of Prussia, though the causes of complaint were precisely the same, such as the interruptions to trade, by unfair detentions, illegal sentences, and the long delay of justice, yet, not one of the objections is founded upon the falseness of the *principle*, as founded in nature, of our conduct as Belligerents; but the whole is confined, either to cases of improper conduct in the pursuit of an unopposed natural principle, or to a discussion of particular rights under the Maritime Treaty.†

In those days, also, came out a *Memoire Instructif* on the part of France to Holland, of the precautions which its merchants ought to observe, in order to avoid falling within the scope of the ordinances of the marine, relative to prize. In the preamble to this memorial it is stated, that every power at war is naturally attentive to prevent its enemies from carrying on a free trade under the protection of Neutral colours; and amongst other things, Article 7th, if Dutch ships carry any goods or merchandise of the growth or manufacture of the enemies of France, they shall be esteemed good prizes, but the ships shall be discharged. In Article 8th it is stated, that the passports given in Holland to a Dutch ship shall serve for that voyage for which it is given; that is, to go from the place of its loading to

* See Sir Joseph Yorke's Memor. to the States Gen. 22d Oct. 1758. An. Reg. 1758.

† Summary Exposition of the Case of the Dutch Ships, Amsterdam; abridged, in the case of the Dutch ships considered by Sir James Marriott, 35 to 47.

that

that of its destination, and from thence to return to Holland. If it should make any other *intermediate* voyages with that passport, it shall be declared a good prize.*

It was in this war also that many of the foregoing principles and much of the historical deduction was drawn up with force and perspicuity, by the present Earl of Liverpool,† in a discourse, which, being in every body's hands, need not here be mentioned more particularly than to shew, in conjunction with these last instances, on the parts both of Great Britain and France, how every thing in the diplomatic history of Europe conspires to prove the uniform assertion, whenever opportunity arose for its discussion, of the principle, *taken as such*, in all times and by all countries. The single exception of Prussia, in 1752, to which we have adverted, could never be counted in the scale, from the very circumstance of its being single; but the conduct of that King, which was founded upon the new claim, having, as we have seen, been changed, and totally relinquished, the claim itself must be considered as having been relinquished along with it, and the rule stands thus confessedly in history, even without that single and solitary exception.

I think we may, with confidence, appeal to the Professor himself to point out whether these assertions are not proved from the history of the world, from the earliest known time to the days of Hubner, or, at least, to the æra of the Exposition des Motifs; since, as has before been adverted to, he himself confesses, that this was the first time that the *rights* of Neutrals were 'completement discutés.'‡ But not to confine him to the strictness of this confession, we may say, I think, without running the hazard of contradiction, that

* Summary Exposition of the case of the Dutch ships, Amsterdam; abridged, in the case of the Dutch ships considered by Sir James Marriott, 35 to 47.

† Discourse on the Conduct of Great Britain with respect to Neutral Nations. ‡ Schlegel, 8.

there

there is nothing in his work, at least, which militates against our position, except some very unqualified assertions, wholly without proof, and without an attempt at proof; which can only, therefore, be attributed to his not properly distinguishing the things agreed on, by particular treaties, and the things which all States have a right to claim, and do actually insist on, without any reference to treaty, or even to custom.

That this is not too overstrained a charge against both Schlegel and Hubner may, I think, be collected from the sense which they put upon what they call the *conventional*, or the *positive* law of nations. This, throughout their works, is uniformly and invariably applied to the stipulations of treaties, which, in every light, appears to me erroneous. For, not to mention that it is sometimes applied where the case can by no means warrant it, supposing them to be otherwise right; I mean where the treaties bear no sort of proportion to the number of States that obey a different law; the phrase would still be inaccurate, although by far the greater *number* of the States of the world were to become parties to the treaty.

This may be collected from the forcible import of the phrase, *Law of Nations;* a term so extensive, so abstract, and of such intrinsic weight, that it implies the duty of all nations, in all times, places, and circumstances, independent of any change of situation, and, consequently, of the relations of peace and war. By which last, we mean not that some of those duties may not be *suspended* by the terrible operation of the state of war, but that when peace returns, the law shall also return of itself, by the common course and intendment of its institution, and not by the intervention of any new compact, treaty, or agreement.

This character of a law of nations, under what is called the primitive or natural law, is matter of every day's experience; since the laws of Nature and Reason, which are its foundations

foundations, can never be altered, when left to themselves, under any change of place or time. But neither do I see that this character can in the least be altered, merely because it is conventional; for the force and definition of the term law, *taken as such*, must be equally extensive and precise, whatever its foundation or its obligatory powers may be. Once admit, therefore, that it is law, and nothing short of the power which gave it existence is equal to the task of its destruction: its authority, *while it lasts*, must always be equally extensive, uniform, and certain, and not likely to be affected by adventitious circumstances, springing from the arbitrary or capricious conduct of one, two, or three of the States that joined originally in its constitution. But, above all, it must ever continue to bind the *whole* of that society of States which originally stipulated to be bound by it; for if it were otherwise, I do not see how it is possible to use the term itself, of Law of Nations, with any sort of propriety or accuracy, or, what is more, with any chance of effect in point of argument, or pleading before any tribunal of the Law of Nations. For that law, whether founded in nature and reason, or simple convention, is that which, emphatically, may be relied on in point of plea, before a court of Law of Nations. It is those courts that are alternately to decide upon claims, and resistance to claims, according to law; and the conventional, once established, is acknowledged there as of equal force and authority with the natural law. The authority of treaties is also there acknowledged between those States that have made them. But how a British subject, for example, where no British treaty exists, can be concluded by those courts, on a point of mere institution, on the ground that Russia, Sweden, and Denmark, in conjunction, we will suppose, with all the other States of the world, have formed treaties together, it would puzzle the understanding to conjecture. In fact, those courts, in questions of right, founded upon treaty, look alone to the trea-

ties themselves for the discovery of those rights; but for rights founded in the law itself, whether conventional or natural, they look either to natural sanctions or human institutions. In the first case, they look to the Law of Nature; in the last, they look to the fact; and if the fact is not to be discovered, even without the existence of treaties, in universality or uniformity, but with great and various exceptions, the law itself is wholly at an end. Whenever, therefore, we attempt to set up a right, or to repel a claim, upon the ground of *the Law of Nations*, we mean (or we can mean nothing) that there is, in the very force of the term, an authority so implicitly acknowledged by the party with whom we are reasoning, that it is not necessary to go farther; so that the only reply that can be made is, not to deny his obedience to the law, but to question the fact of its being law.

Now, the conventional law of nations, deriving authority from universal custom, it is very material indeed that the party reasoned with should have complied with that custom, or the matter must instantly drop, as 'res inter alios acta.' It is in this, as we say, wholly unlike the primitive Law of Nations, which, as was before observed, must bind every one, whether he chuse to deny it or not, because its force, power, and divine authority must ever be the same; and any attempt to withdraw from it may be rebellion indeed, but never can be an abrogation; the party withdrawing entering into the class of common barbarians. But, if what is here called Conventional Law was never submitted to, in point of fact, by *all* the States which, it is said, are its subjects; if only part of them have submitted to it; if, besides, from the course of human events, even this universal contract (supposing it to be universal) must ever be liable to be trenched upon, weakened, and diminished, in the number of its contracting parties; nothing with the force of Law of Nations

Nations can ever be expected from so feeble, fluctuating, and uncertain a state.

Now, to apply these principles, we may observe, that there are some certain customs agreed upon by all the nations of Europe, and springing out of that similarity of manners, origin, and religion, which characterizes them, or derived from the intimacy and duration of their connections together, which, from being invariably and *universally* observed, although not the effect of the mere Law of Nature, have come to have the force and authority of law. These, whether they were the silent growth of time, the effect of Christianity, or originally the offspring of universal compact, are never, or scarcely ever, known to change, whatever exigency of affairs may fall out; and these, therefore, may very properly be called the Conventional Law. Of this nature are—the right of sending ordinary or resident Ambassadors to one another's courts, which cannot now be refused without an affront; the respect shewn to flags of truce; the abstaining from putting prisoners to death, or their reduction to slavery; the prohibition of the use of poisoned weapons; the respect shewn to particular signs and ceremonies, such as appear in taking possession of newly discovered countries; the abstaining from contraband in war; many of the laws regarding salvage and re-captures at sea; the respect shewn to an actual blockade, or an order of embargo: all these, and others, whether originally the growth of the treaties of *all* nations or not, are, in point of fact, acknowledged by all nations, in all times and places, some of them in peace, some of them in war, and all of them, whether peace or war intervene not; so that, although war may suspend some of them for a time, their authority instantly returns on the renewal of peace, without having recourse to new conventions.

Here, then, is conventional law; but I do not see how, in the nature of things, because a proportion only of the

States of Europe (allow it to be a large proportion) have chosen to establish certain points of compact together, which are not only not assented to, but protested against, by others, and those points pure matters of agreement, not grounded upon the Law of Nature, but, perhaps, in derogation of that law: I say, I do not see that the thing agreed upon by these compacts can ever assume the dignity and power of binding *all* nations, except upon the supposition that a few, or any number, of independent Sovereigns have a right, by treaties amongst one another, to bind other Sovereigns equally independent. This, at least, can never be the argument of those who defend the neutral pretensions; since this would be neither more nor less than to fall into the very faults of which they accuse the more powerful Belligerents; and, indeed, for obvious reasons, can never be defended, either by them, or any other persons, by any turns of ingenuity, or any force of reasoning whatsoever; and, therefore, we will not waste time in the discussion.

But farther, if even all the States in Europe were to agree to any particular thing by treaty; though the point agreed upon would have as much force, *while the treaty lasted*, as any law whatsoever; yet, according to our principles, that force would not be derived from the law, but the compact. For we must always bear in mind, that it is the important circumstance of being superior to every power, except that which formed it, that forms the very character and essence of a law. Law, then, when once established, must exist in all times and places, be superior to the adventitious circumstances of peace and war; and, while it endures, must endure with undiminished force, clearness, and authority.—This, however, can never be the case with matters of treaty, even although the parties to it should be no fewer than all the nations of Europe; because, exclusive of the circumstance that every member of the compact is himself the

the judge of its interpretation, the very nature of treaties is to exist no longer than during the continuance of peace and friendship between the contracting parties; which words *no longer* do not mean that they revive of themselves when peace is re-established, but that, by the very act of war, they are annihilated, not suspended, and can never be renewed, except by some formal stipulation in the new treaty of peace. Hence, in every treaty of peace, the contracting parties are careful to insert what of their antient treaties shall again be put in force, what modifications they shall undergo, what privileges shall be preserved, and what claims asserted. But if this is so, as the fact of almost perpetual war in Europe, among some or other of its nations, is too true for contradiction, observe how it will affect even that conventional law of nations, as it is called, which, for the sake of the argument, we suppose to have been solemnly acceded to by *all*. Should *two* nations go to war, the law is instantly abrogated *as to them*, and will require a new compact, after war is over, to ascertain whether it is still the law of *all* nations. Should *more* than two go to war, the breach in the law is still more extended. Should the Belligerents be united by alliances with *many* other nations, (and such is the plan upon which Europe has long proceeded, that it is now scarcely possible for any two of the principal powers to appeal to the sword, without drawing along with them almost all the rest,) then this law is for ever at an end, as far as it depends upon itself, between all those nations that are ranged on the one side, and all those that oppose them on the other. But should it happen that some of the belligerent nations should change sides during the course of the war, (of the possibility of which we have at this moment but too many melancholy proofs), then the abrogation will be extended, not only between the confederates on the one side and those on the other,

other, but between those themselves, who, at first, had been ranged under the same alliance; in other words, between the very confederates. And thus, if the stipulations of treaty can be called the conventional law of Europe, because entered into even by *all* Europe, (a circumstance absolutely essential to the very term itself), there is scarcely a year in which new conventions must not be made by some one nation or other, to ascertain whether the conventional law is in existence or not.

But where the fact actually is, that only a part of the States of Europe have entered into the treaty; and when the whole history demonstrates that many have ever refused to form such a treaty; then, beyond all doubt, and upon the mere signification of terms, the particular thing stipulated for can never acquire the force of a law of nations, for the plain reason, that nations have never enacted such a law.

But an objection here meets us, which has caused perpetual discussion whenever the question has been started, has often divided opinions, and filled the whole subject with doubt. As nations, it is said, are all in the same state of independence one towards another, and own no superior sovereign to decide upon their differences, or expound the Law of Nature which governs them; they have had recourse to the stipulations of contract with one another, in order to ascertain more precisely what it is that is thus writ down in their duty by the law which they acknowledge. Consequently, whatever doubts might be entertained before any treaty was made on a particular subject, the moment those doubts have been deprived of their uncertainty, by the express provisions of settled compact, the law stands disclosed in all its truth, may ever after be reasoned upon, and must be obeyed. Hence it is that in treaties we look for the law; and if the majority of nations, or of treaties, have settled to pursue or abstain

abstain from any particular line of conduct, the interpretation of the law of nations is then rested upon a sure foundation; and hence if a considerable majority of treaties determines upon any particular point, it instantly explains what ought to be the law, and shall become the general rule where there is no treaty to meet it with contrary stipulations.*

On the other hand, it is said, that so far from finding the law in the stipulations of convention, those stipulations are expressly introduced, in order to shew that the law in particular instances is renounced. In vain, says the argument, do you contend for the observance or the existence of a Law of Nature, or an universal custom, if it is necessary to define it by express agreement. Those laws must be engraven in the heart of man, or at least be perfectly familiar in the customs of man; and therefore when we find whole societies entering into compact with one another, concerning any particular path of conduct, it must be with a view, in *departing* from what is so well known, to point out exactly to what degree it shall be abandoned. An agreement therefore to abide by any given mode of conduct, is in direct derogation, not in affirmance of the law, whether conventional or natural.

Perhaps the truth will lie between these two opposite plans of reasoning: and probably it will not be very difficult to shew that both are in part, neither of them wholly in the right; since nothing can be more true than that nations have made treaties both to confirm and derogate from the law; but as long as there is this doubt

* Schlegel, 56. Puis donc que les traités, en vertu desquels la marchandise est couverte par la neutralité du pavillon, forment par rapport aux autres une majorité si considerable, on doit légitémement les envisager comme contenant la régle générale, et ceuxci seulement comme une exception: *d'ou il résulte que cette régle qui d'ailleurs est, comme on l'a vu, fondée sur le droit des gens naturel doit s'appliquer aux etats avec lesquels il n'existe point des traités contraires.*

and

and difficulty concerning them, it shews how futile are all allegations that the law is conclusively to be drawn from either, if either is considered without proper enquiry into accompanying circumstances, without modification and without reserve. Amply therefore does it shew with what little reason the dry letter of treaties (in whatever number they may be brought forward, either by the one party or the other) is a conclusive indication of the abstract and intrinsic law. There are two sorts of treaties, says Grotius; one by which we stipulate for the observance of things ordained by the Law of Nature; the other, by which we add something to that law. As an exemplification of the first part of this observation, he says, that men having quickly forgotten that rule of Natural Law by which they are taught that there is an original relationship between them, were found to have recourse to treaty, in order to obtain the jus hospitii, and the jus commercii quatenus ista sub jure naturali veniunt.* As an instance of the second, amongst others, he reckons equal treaties of commerce, and of common cause in war.† Vattel, after him, pursues the same division;‡ and the inspection of the different provisions of a variety of treaties in Europe will prove how difficult it is to collect from the mere circumstance of making a treaty, whether the parties have renovated and given active vigour to a torpid Law of Nations; or enacted something unknown before, and in addition to that law. This can alone be collected with truth, from a free investigation of the thing itself stipulated, which thus returns to its abstract state, wholly independent of treaty, and liable to be canvassed precisely with the same free-

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* D. Jur. B. et P. 2, 15, 5, 3. † Id. 2, 15, 6, 1.
‡ Droit des Gens, 2, 12, 169, 172.

dom,

dom, and according to the same rules which governed it before it took its station under the class of compact.

Of things which existed in the Law of Nature before they ever became objects of treaty, and which must ever exist there, though all treaty was to be annihilated, the following are some of the most remarkable :—All general stipulations of peace and friendship, often necessary amongst those nations who formerly thought that where there was no treaty, there was no friendship ; and in the case of ill treatment by the Spaniards in the seventeenth century, actually quoted by the English under Cromwell as their more immediate protection :* all the stipulations against the entertainment and protection of *pirates*, which form an article of almost all the commercial treaties of Europe : all promises to deny permission to enemies to fit out hostile armaments in the ports of a Neutral,—which fill the maritime treaties from the oldest time to the present. All conditions also, where the ships of friends are forced into port by stress of weather, or the pursuit of pirates, or the enemy, that they shall be received with humanity, which form an article in the conventions of the most modern times:† in like manner all conditions that they shall receive assistance, and not be plundered while under the misfortunes of shipwreck (which one would think would be pointed out by the common feeling of breasts the most obdurate): all stipulations when

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* Upon the murder of Charles I. the Spaniards treated some English at Malaga with the greatest hardship and indignity, at which the government itself was supposed to connive. The Council of State, in their memorial to the Spanish ambassador, grounded their right to better treatment upon the 1st, 6th, and 7th articles of the existing treaty with Spain ; which stipulated nothing more than that they should 'mutually shew good 'offices, and abstain from force and wrong doing.' 1 Thurl. 176.

† See treaty between America and Spain, 20th Oct. 1795.—Debret's State Papers, 40.

merchants

merchants and clerks are admitted into a country as residents for the purposes of trade, that they shall comport themselves with deference to the laws:* all general engagements, while neuter, not to assist our enemies with comfort and advice; under which, as we contend, is included a promise to abstain from the carrying trade: these, and other provisions of the like nature, flow immediately from the obvious rules of justice, engraven on every man's mind; and standing alone would be strenuously supported by the courts of law in civilized countries, though they had never been fenced about with the sanctions of treaty, or were bereft of their support after having enjoyed them.

On the other hand, a vast variety of stipulations concerning positive duty accost us in the perusal of almost every convention in the chanceries of Europe, which no research into the Law of Nature, no study of conventional institution, could ever of themselves point out. Such are all commercial regulations within the jurisdiction of the country visited: the numbers in which foreign ships are allowed to enter particular ports: all ceremonies, and partial acknowledgments of sovereignty, allowed by some countries and denied by others: particular specifications of prohibited goods bearing harder upon one country than another: agreements to confiscate the property of friends on board the ships of enemies, which was formerly long objected to, and has now long been allowed: the necessity for particular muniments, such as passports and bills of lading, in order to ascertain the property in a ship: the mode in which the right of search on the high seas shall be exercised, by three, four, or five of the crew, or more at pleasure: all subsidiary or auxiliary treaties by which a part of its force is furnished by one

* Treaty between England and Russia, Feb. 1797.

country

country to another, without drawing on a war with that against which it is to serve. These, and many more, which every man's particular observation can almost supply, may all be considered if not in derogation of, yet certainly as not immediately ordained by the law of nations. Many conditions besides are in the nature of pure compensations, in order to secure as much advantage on the one hand as is parted with on the other; and wherever a price is paid for its allowance, there must at once be an end of all argument concerning its intrinsic power as a Law of Nations. And thus we see that it is in vain to contend that any one point of the acknowledged duty of nations flows from this or that foundation of its laws, merely from the naked fact that it is provided for by treaty. The only one in which it can fairly be argued that the stipulations contained are evidence of the affirmance of the law, is where it is expressly stated so to be. Where nations agree *in terms*, that any general principle they are about to lay down as a guide for the different articles of their compact is a principle of law, and therefore to bind and interpret what they are about to stipulate,—such a treaty is very conclusive evidence of what the parties at least thought of the law, although the point itself is entirely open to the examination of other parties. And it is in this as in our acts of parliament which are often in affirmance, often in derogation of the common law; but are never evidence in themselves that they are either the one or the other, unless their preamble states them so to be. Where nothing is mentioned, the fact remains to be tried by its own intrinsic merits.

The provisions then of treaty being made both for things evidently taking their foundations in nature; for those which are as evidently of positive institution; and for those also which may be considered as belonging to neither,—

neither,—nothing with precision can be collected concerning them, but every thing must be canvassed, distinct from all its different bearings and relations; and it must stand by itself as if no stipulation had ever been made, no compact framed for its better existence.

These objections to that doctrine which states the engagements contracted by treaty to be the same thing with the conventional Law of Nations itself, appears insuperable to those who wish to conduct themselves with certainty and clearness through the broad field of laws.*

Now all these absurdities, difficulties, and entanglements, may at once be avoided; the whole labyrinth laid open, and every doubt removed by the simple reference of the point to its right and true foundation, the mere transitory authority of agreement between those nations, and those alone, which have contracted together.

With this for our guide, the duty of nations in the

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* Hubner himself, in a variety of passages, is careful to point out that treaties can only bind the particular nations that frame them. Speaking of the treatise of *D'Abreu*, he imputes to it as a fault, that it is confined to the maritime laws of Spain. It is true, says he, that general principles are sometimes sought for, and even treaties sometimes cited; but these are always *Spanish* treaties.* Again, in discussing the cases wherein neutral vessels are not seizable, he says, "An abuse will not make a law; I will not even here examine the articles of different treaties of commerce and navigation, by which some nations *ont renoncé* à une partie de leurs droits —chaque puissance est libre de s'arranger là dessus, comme elle le juge apropos, mais elle ne doit pas prétendre que ses engagemens fassent une loi pour d'autres, ou qu'ils obligent les peuples souverains et independans *qui ne sont point parties contractantes.*"† Yet Schlegel, as we have seen, does not hesitate to say, that because a considerable majority of treaties have determined upon a point, that point shall become the general rule for those who have made no treaty against it; nor does the circumstance of founding the rule in question before him upon the Law of Nature make any difference, because a necessity for doing so makes no part of his assertion; and indeed would be wholly unnecessary, because a Law of Nature ought to be obeyed, whether confirmed by treaty or not.

* Hub. Pref. 19. † Id. 128, 140, 176, 177.

circum-

circumstances specified becomes instantly simplified, marked, and clear. No clashing of interest, no contrariety of doctrine, no circuitous reasoning from doubtful customs, or ambiguous terms, are then so likely to arise and obscure the fair line of reciprocal obligation; but every thing is at once referred to the short letter of the contract, which in most cases decides as soon as consulted.

Not so at all times is it with the conventional, nor even the Natural Law; but infinitely less so when an attempt is made to confound treaties with those laws. Amidst that confusion, I see no rule for courts of justice, or their suitors to follow; not a gleam of light arises to conduct us through the gloom; and then indeed the code of even this civilized age will be liable to the aspersion thrown by Hubner upon the *Consolato del Mare;* namely, 'ce 'ne soit qu'un amas, ou un récueil assez mal choisi, de 'loix maritimes et positives et d'ordonnances particuliéres 'du moyen âge ou des siecles peu éclairés.'*

Notwithstanding these obvious and, as it should seem, invincible objections, *Hubner* and his countryman, *Schlegel*, have yet chosen to consider the Law of Treaties as the Law of Nations, in almost uniformly styling it the *conventional* law. In the work of the former, he states the following definition to be an *Idée du droit des gens conventionel.* 'L'assemblage des régles obligatoires, *fondées* '*sur les engagemens pris par des Etats souverains*, ou par 'leur chefs, et faites pour diriger la conduite réciproque '*des parties contractantes.*'† And he explains what is meant by *engagement* in the part introductory to this definition, where he says, 'Nous en traiterons maintenant 'suivant le droit des gens sécondaire et conventionel, ou 'sélon la téneur des traités de paix, d'amitié d'alliance, de

* La Sais. des B. Neut. Disc. prelim. p. 12. † Id. tom. 2, p. 131.

'commerce

'commerce, ou de navigation, qui subsistent entre *plusieurs* 'puissances modernes.'* In another part he says, 'Ces en-'gagemens se prennent par le moyen des contrats poli-'tiques qu'on nomme traités, conventions ou capitula-'tions;' † so that the meaning of the definition, with which we should not be disposed to quarrel without the explanation, is by that explanation rendered, according to our principles, wholly unsatisfactory; since nothing seems clearer from the language itself of *plusieurs puissances* and *parties contractantes*, that if treaties are in question, they can only bind those *several* States and those contracting parties.

After all, however, it would perhaps be not of much import, if this confusion of terms was left as it is, open to every man's observation, if all discretion upon the point was not taken away in a treatise like this from the use which is everywhere attempted to be made of it. For if we grant the definition with its explanations, as contended for, the supporters of innovation say that they struggle for nothing more than what has long been settled by treaties between a vast number of the States of Europe; and consequently for nothing more than what ought to be considered as the law of Europe.‡ It is therefore of extreme importance that mankind should not be deceived by an inaccuracy of terms, which, if not stripped of their fallacy, and placed in their true light, may have a dangerous as well as a most important effect on the theory of jurisprudence, on the conduct, and even on the fate of nations. At the same time, however, it is incumbent upon those who dissent from this account of the conventional law, to inquire into the reasonableness itself of what is asserted, (whether law or not), and to ascertain

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* La Sais. des B. p. 130. † Id. p. 133. ‡ Schleg. 56.

whether

whether it is true, in point of fact, that the principle before us has really been consecrated as the *general principle* of Europe, as it can be discovered in the treaties which have actually been made. This therefore will be the object of the next section.

SECTION THIRD.

THE QUESTION AS IT DEPENDS UPON TREATIES.

THE Danish civilians, in supporting the maxim before us, in addition to such arguments as they have drawn from reason, rely mainly upon what they assert to be the law of Europe as found in its various conventions. Hubner, for the most part, takes up this law within the last century; but *Schlegel* extends it to 1642, the commencement assigned by *Busch*, in his Collection of Treaties. At the same time, thinking that it would augment the means of the support he meant to give to the question, he brings forward a treaty of our Edward III. with Spain in 1351, and of Charles I. with Portugal in 1642.

The treaties of Europe form so vast a part of the rule which governs the conduct of each of its States, have swelled to such an enormous size in point of number, contain so many various, and sometimes such contradictory stipulations, and open a field so immense for discussion by way of analogy and comparison, that it is not an easy thing to settle what general principles may be collected from them, except by a thorough and accurate inspection of the whole. Why Hubner, in canvassing a great principle of law, of the very first consequence to all maritime States, confined himself to some seven or eight, all but the Pyrenean treaty, within the last hundred years,

years; or why Schlegel should content himself with the periods adopted by Busch, can only be explained by the obvious reason that such an insulated number fell in best with the object they each had in view; namely, the assertion of a particular *assumed* point. They argue, as it were, *a priori*; they assert a particular proposition, and of course give that shape to their enquiries which best suits what they have asserted. Denying as we do the power of any number of treaties taken *per se*, to decide upon the law of Europe, or in any degree to influence more than the conduct of the contracting parties; it is of little consequence to this disquisition how the matter may turn out to have been *thus* settled. But for the better understanding and more perfect knowledge of the real state of the case, the investigator would do ill, in an enquiry of this kind, to stop short at any particular period, or be content while any one commercial treaty remained unexplored which it was at all within the compass of his power to examine.

Before we engage however in this enquiry, it will probably be not amiss to pause upon such diplomatic examples as the Danish civilians have thought fit to produce; for, although the order of our research may thereby be almost inverted, and certainly deranged, yet as what was actually determined in those examples demonstrates that inferences are drawn from them which they will by no means warrant; we collect a circumstance of no small importance in our investigations, either that our opponents again go beside the fair question before us, or that their conclusions are all of them false in point of argument.

The first treaty mentioned by Hubner, is that between France and Denmark, 23d August, 1743, and is honoured with all his praises. It is composed, he says, in a spirit which

which redounds not more to the justice than the intelligence of the contracting powers. It asserts and confirms, in a manner the most positive, that great general maxim of natural law upon the subject of neutral navigation and commerce; that it ought to remain upon the same footing as in time of peace, *without any other modification than that which arises from the nature of neutrality itself.**

There is therefore at least some modification by his own shewing; and that by no means unimportant in its kind, being neither more nor less than what will make the whole difference; namely, that which does arise from the nature of neutrality. If it is the nature of such a State not to interfere in war; not to supply men to belligerent traders, in the place of those who fight in belligerent fleets; the question is already determined between us. The liberty of commerce therefore, *as thus stated,* is palpably nothing more than that liberty which, as we have shewn in preceding parts of this work, was in older times denied without the intervention of treaty: that liberty also which half the existing conventions of Europe denied in the very moment when the treaty in question was framed, in all those articles which specified that though free ships might make free goods, yet that goods of neutrals found on board the ships of enemies, should be confiscated along with the ships as prize.† If this however was even not so, what, under his favorite stipulation, 'that trade should 'be free as in time of peace,' becomes of the right to the colonial carrying trade, which had never been enjoyed during peace? Yet this is equally an object of neutral

* Hub. tom. 2, p. 139.

† See the existing treaties, 'where free ships, free goods' is stipulated; for the one always follows the other.

claim if the belligerent will consent to it, though only, to use his own expression, 'pendant la guerre, et a cause de la guerre.' *

Upon the inspection of the treaty, even in the articles which Hubner has furnished, we find that all it states in favour of neutrality is the power of sailing at will from their own or neutral ports to the ports of the enemy of either, and from enemies' ports to enemies' ports, without trouble or hindrance, in the same manner as before the war. Blocked up ports are defined to be those which cannot be entered without manifest danger; and it is provided, as it had before been provided by almost all commercial treaties for an hundred years, that no men or ships should be forced under an embargo to take part in the war against their will. At the same time it is remarkable, that not a syllable is said of free ships making free goods; the point in dispute, although the example of all surrounding States shewed the necessity of noticing it as an article of treaty whenever desired by the contracting parties.

There is nothing therefore in this boasted treaty so honourable to the justice and the intelligence of those who formed it, and so ample an illustration of the true Law of Nations with regard to commerce,† which would not almost be granted by every commercial treaty. If we except the words 'trading as in times of peace,' it was very little different from the treaty then actually existing between Denmark and ourselves; which especially provided that the parties might trade with the enemy in time of war. Yet that trade, as might be shewn from other parts of the treaty, was not meant to extend to the right of carrying

* See page 14.

† C'est ainsi qu'en decident le droit des gens universel et le xxme article du traite, &c. &c. Hub. 2, 139.

enemies

enemies' goods:* a right which, according to our principles, was always excluded by the generally received and acknowledged duties of neutrality.

I have been the longer in this examination, because it seems to be the treaty most strenuously relied upon by *Hubner* as a pattern of all that he wishes. But as nothing is said of the carrying trade at all, and (whether to exercise or to abstain from that trade be a natural right or not) as it is notorious and beyond all contradiction that, where nothing was stipulated in terms concerning it, the nations, in point of fact, always did confiscate enemy's property; we are at a loss to discover what specific point is meant to be proved by it. *Hubner* must therefore either have cited this treaty, as a proof merely that a trading with the enemy is a natural right, without at all meaning to contend for the other; or if he did contend for the last, he leaves a cloud of doubt and misrepresentation upon the authority he cites, and his mode of argument from *cases*, is at least not convincing.

The second treaty cited by Hubner, is that between Denmark and the Two Sicilies, April 1748, which he says, not only establishes the same liberty with the last, but adds a clause *still more advantageous* to that liberty.† This article is neither more nor less than a very common one in the treaties of that time, and the times preceding, which frequently gave liberty to one of the contracting parties to continue its trade with the enemies of the other. The words are, 'Leur apporter, sans aucun empêche-'ment, toutes sortes de marchandises, à l'exception de 'celles qui sont de contrebande: a moins que ce ne soit

* See the treaty 1670. 13 Corps Dip. 132, particularly articles 15 and 20.

† Hub. 2, 144.

'dans une ville, port ou endroit assiégé; auquel cas il leur 'sera libre toutefois de vendre leurs marchandises aux 'assiégéans, ou de les aller vendre & porter en quelque 'autre ville, port ou endroit qui n'est pas assiégé.'

It happens also peculiarly, that this article, which adds, it is said, a clause so advantageous to the liberty of commerce, is, word for word, the same with the 16th article of the treaty 1670, which was last cited as existing between England and Denmark itself. Yet that treaty, as has been observed, prohibited the parties from carrying enemy's property; not indeed by an express and independent stipulation, but in a manner infinitely stronger in favour of the argument; by a forcible reference and plain mention of the point as the known existing law. The 20th article provides for passports, and is as follows: 'But lest such freedom of navigation or passage of the 'one ally and his subjects and people, during the war, 'that the other may have by sea or land with any other 'country, may be to the prejudice of the other ally; *and* '*that goods and merchandise belonging to the enemy may not* '*be fraudulently concealed under colour of being in amity;* for 'the preventing of fraud, and clearing all suspicion, it is 'thought fit that the ships, goods, and men, belonging to 'the other confederate, in their passage and voyages, be 'accompanied with letters of passport and certificate; the 'forms whereof to be as follows:'—

The passport itself contains the necessary assertion, that the cargo really belongs to 'the subjects of Den-'mark, *or to others in neutrality*:' and thus the carriage of enemies' property is not only prohibited by this treaty, but is prohibited in a manner which evinces that the contracting parties proceeded upon it as upon the known and acknowledged law.* But if this is so, no argu-

* See the treaty with Denmark, 1670. Corps Diplom. 13, 132.

ment

ment whatsoever, in favour of the position in question, can be drawn from the treaty with Denmark, cited by *Hubner*. Since, though it contains an article very favourable to commerce, that article is contained also, word for word, by a treaty, which plainly disallows and repels the position.

The same remarks are of course applicable to the next example, relied upon by Hubner (the treaty between Denmark and Genoa in March, 1756), since he cites it as containing precisely the same provisions. Thus much however may be added; that from the date of the treaty, it appears to have been made in the very heat of that war, and in the very capital of France, in which the Danes complained loudest of the invasion of their neutrality by France. Perhaps it was made at the moment when Hubner himself, the delegated assertor of Danish neutral claims, was at Paris, on the spot: it is strange, therefore, if the principle of free ships making free goods, was even at that time ever claimed as a neutral right, that treaties, which he cites as models of the liberty of commerce under the natural right, should not have contained an express provision to protect it from invasion.

His next authority is the great Pyrenean treaty between France and Spain. In vain however is it examined, in any thing which he cites of it, for the allowance of the maxim. Much indeed is to be found in support of the general freedom of trade, which, subject to proper exceptions, has all along been allowed: we find stipulations that ships and men shall not be pressed into the service of belligerents; that the subjects on both sides shall have free liberty of navigating to all ports friendly to themselves, though hostile to the other party; and that they shall not be troubled or hindered on account of the

war : but no notice is taken whatsoever, in the parts cited by Hubner, of the claim or supposed right to carry enemy's property. As far therefore as depends upon him, though the fact is otherwise, nothing can be collected from this treaty in affirmance of the maxim.

The next treaty relied upon by Hubner, is that between France and the Hanse Towns, Sept. 1716 : and his reasoning upon it is as little conclusive as it is strange that he should have cited it at all. The 8th article provides, that no ships or men shall be pressed into the service of France when belligerent ; and the 13th, that they shall not be stopped or detained, except they are laden with contraband, *or the goods of enemies.* This last clause is so fatal to his object, that he is obliged to add, that it is purely positive, and therefore mere matter of convention : but why, in a part of his work which asserts the treaties of Europe to be themselves its conventional law, and which proposes to enquire what that law is, as it is found existing in treaties, he should explain away the very treaty which he cites, as being mere matter of convention (the point itself about which he is enquiring) I own myself wholly at a loss to discover. At the same time, whatever is his purpose, he is peculiarly unfortunate in his selection, because the national law of France, one of the contracting parties, proves that the exception as it is called *could not be,* and was only in consonance with its received and fundamental principles concerning neutrals ; and therefore that it could not be mere matter of convention. That law, when not changed by treaty, from the time of Francis I. confiscated all enemy's property found on board Neutrals ; sometimes with the Neutral vessel itself, sometimes relaxing that latter rule, but always, in all the royal ordinances, confiscating the property.

In

In 1704 in particular, only two years before the treaty in question, it was strenuously and generally renewed and enforced in all its ancient strictness; the ordinance of that year confiscating the neutral vessel itself for carrying enemy's property, and even for trading with the enemy's ports. Nor was this ordinance at all relaxed for the space of forty years; and then only in favour of those countries, with which contrary stipulations had been made, and expressly on account of those contrary stipulations. The ordinance of 1744 approves that of 1704, in the abstract, in the most unqualified manner; and only abrogates those parts of it which are incompatible with treaties.* Hence it amounts to a demonstration, that the enforcement of the old law of France, and in particular of the ordinance of 1704, by a treaty in 1706, could never be deemed a positive exception to the general rule, or purely matter of convention.

That Sweden should make a treaty with France in 1741, reserving, as he states in his next example, all those parts of the last mentioned compact which were advantageous to navigation, but rejecting all the burthens, is neither surprising, nor anything to the purpose; unless (what he does not assert) she introduced an express principle, flowing from the Law of Nature, and militating against the conditions from which she was to be exempt. That she did this however, as he insinuates, because such conditions '*n'iroient pas à une puissance qui tient un rang* '*distingué parmi les nations modernes*,' is what no person will assent to who is at all acquainted with its history. The spirited Christina, in the ardour of her mind, at least

* See the Reglements of 1704 and 1744, 2 vol. 248, 250.

worthy of being the daughter of the great Adolphus; or the active, the vigorous, and politic Charles Gustavus, was as prompt to see, and as bold to assert, what became the rank and dignity of their nation, as the yielding Ulrica, or the foreign Frederick I. Nor was the nation itself, when it had just influenced the fate of Germany, the conqueror of the Pole, the Dane, and the Muscovite, less powerful or elevated in the rank of sovereigns, than when beaten and even crushed by the ascendency of the latter. Yet such is the sort of fatality which attends *Hubner's* observations, that in the former period, and under those high minded sovereigns, Sweden yielded (if to acquiesce in the law can ever be called yielding) that very point to England in the seventeenth century, which she was *too elevated in rank* to yield to France in the middle of the eighteenth.*

The last example cited by *Hubner*, is the treaty of Vienna, 1721, between the Emperor and Spain; and the articles regarding Neutrals being conceived in the precise terms of those of the first treaty, mentioned between Denmark and France, are open to all the observations there made. Nor can we too often attend to this important consideration; that, while it is known that the great maritime Powers have universally and uniformly claimed a right to confiscate enemy's property found on board neutrals, when there is no treaty to the contrary;—and more particularly, when many countries have made treaties to the contrary, to serve especial interests;—all *general* stipulations of a right to navigate freely and

* By the treaty of Upsal, under Christina, and of Whitehall, under Charles XI., precautions were stipulated *to prevent the fraudulent concealment of enemy's property.* 2 Chalmers, 34 and 53.

without

without interruption, or to trade as was permitted before the war, can only be referred to as a general rule, subject of course to the proper exceptions, and at most, can only be referred to that great dispute, which once, as we have often observed, divided Europe upon the claim of Belligerent powers, to inhibit all commerce whatsoever between Neutrals and their antagonists.

Such then, and in so small a number, are the treaties on which the Danish civilian relies, in order to prove that what he thus calls the Conventional Law of Europe, has determined for the freedom of navigation and commerce to so vast and unlimited an extent, that every sort of traffic is to be permitted to Neutrals without exception ; and of course, as his commentators explain him, the carrying trade along with the rest.

We have already made it a question, whether any number of treaties can amount to a Law of Nations; but we may with still greater propriety, be permitted to doubt whether seven or eight treaties, entered into altogether by but six of the powers of Europe, and that within the space of fifty years, can decide upon what is Europe's law upon so important a point. With yet greater reason may we doubt whether the treaties themselves, as brought to our observation, furnish any thing like evidence of the opinion that was entertained of the principle before us, even by those who framed those treaties. One of them, as we had occasion to observe, contained stipulations directly in the teeth of the positions of him who brought it forward: and all of them are made up of very general provisions, amounting to such an indefiniteness of privilege, that, if construed literally, it is known that they are denied by the contracting parties themselves. Of this the generally strict

strict reserve of the colonial trade, and the provisions of the Danish treaty with England, last cited,* notwithstanding the same sort of indefinite and large sense which might be put upon its letter, are eminent and conclusive instances. Leave we then such insulated, garbled and feeble examples of the sort of law which is set up, to produce what effect they may upon minds of any size or inquiry; and let us turn to the Danish work of the present day, which endeavours with greater vehemence, and perhaps greater powers, to support the maxim under what its author also calls the conventional Law of Nations; but what, according to our principles, is the mere stipulation of particular compacts.

Professor Schlegel, however, has not given us very detailed means of enquiry; since, although there is a pretty large assertion with respect to the number of treaties which Busch has collected, amounting to thirty-five, and all of them, as it is said, favourable to the principle of *free ships free goods*, Schlegel himself has mentioned but nine, even in figures, which supported the principle previous to the Armed Neutrality of 1780. At the same time, he says, he recollects but two which give in to the contrary practice; namely, those of England with Denmark and Sweden, in 1661 and 1670. Yet, as we learn from Hubner's own enumeration, and in complete derogation of the principle which it was cited to support, there is at least one other that may be classed along with them; I mean that of France with the Hanse Towns in 1706; and the very treaty with Sweden was founded upon two others which had preceded it, in the time of Cromwell. Leaving this however as one of those almost

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* Page 100.

inevitable

inevitable omissions into which the best memories, particularly when the judgment is under the bias of a favourite object, may fall, let us come to the consideration of those which Schlegel himself has actually enumerated; and first of the treaty of 1351, between our third Edward and the king of Castile.

Although this is quoted as full to the point before us concerning the rights of the neutral flag, yet I own I have looked with attention, and looked in vain for the discovery of anything in support of the position. I see indeed a stipulation, such as is to be found in every treaty of commerce, even in those the most severe against neutral claims, that the subjects of the two countries may safely pass and repass with their merchandize of whatsoever country, and to whomsoever belonging, both by sea and by land; * but no mention is made here of a state of war between one of the parties and a third; and, being a simple article of the truce between the two States, it cannot by possibility be tortured to mean that enemy's property may be covered by the neutral flag within the very ports of the belligerent. I see also in another article, that if the king of England or his subjects shall happen to gain a town or castle from his enemy, wherein any ships, merchandize, or other property belonging to the subjects of the king of Castile shall be found; then the king of England, or he who is captain for him, shall, with all the loyalty in his power, and upon the faith of the said truce, restore those ships, merchandize, and property to the subjects of the kingdom of Castile, oath being made 'qu'ils ne soient armez od les enemys le dit roi d'Engleterre et de France, ne ne facent a eux eide socour ne comfort.' †

* 5 Rym. Fœd. 718. † 5 Ibid. 719.

These

These are all the passages of that treaty which apply to the subject in discussion; and very far indeed are they from going the length of proving, because the goods of friends found within the jurisdiction of enemies are to be restored, on oath, that their owners had given no succour to the enemy, that the converse of that position is true, and that the goods of enemies within the power of friends are also to be restored. What was here determined, is in truth in the very spirit of one of the articles of the *Consolato* which has been placed before the reader; yet, strange to say, with what precise ideas I know not, Schlegel, in introducing this treaty of Edward III., accompanies it with a kind of surprise, that it was 'deja vers le milieu du 14me siecle, *et lorsque le Consolato del mare étoit la seule loi en vigueur.*'* The next treaty mentioned by Schlegel, is that between Charles I. and Portugal, 1642, renewed by Cromwell, 1654: an interval from the treaty with Castile of full three centuries. The reason for this amazing chasm, it would not be unnatural to ask, more especially as the first treaty was mentioned, because it is supposed to furnish support to the object in view. Had the Professor confessed at once, that all the treaties with England until 1642, were against his principle, and then challenged its fairness and foundation in nature, from the circumstance alleged, that all from that time are in its favour, we should then know exactly the point about which we are at issue. But the mention of any treaty at all previous to that time, because supposed (with what accuracy we have seen) to bear upon the question in his favour, gives us a fair right not only to examine the treaties adverted to, but also all other contemporary conventions, and even all those that

* Schelg. 57.

fill

fill the interval. The justice of his own august sovereign, and of that other monarch, the cause of whose ships he has come forward to plead, must allow this: because otherwise, as there is a positive assertion of the prevalency of the principle from 1642, and a positive (though, as we have seen, most mistaken) assertion of its existence in 1351, it might otherwise be supposed that the principle as laid down, had actually existed during all the interval in the same unopposed vigour and extent of acquiescence. Before we inquire, however, into the history of treaties from the middle of the fourteenth century, it may not be improper to ascertain what actually was decided in those treaties of Charles I. and Cromwell with Portugal; and I own, from the best attention I am able to give them, I am wholly at a loss to discover any thing to warrant the assertion that they are conformable to the principle of free ships making free goods.* The 10th article of the treaty 1642, stipulates, (as in many others that have been mentioned) that ships and subjects shall not be pressed in war, the justice of which we nowhere deny; yet even that article allows that goods may be taken for the service of the king of Portugal, upon payment, within two months of the current and reasonable price. The eleventh article gives general permission to the subjects of Great Britain to sail to the ports of Spain, there to exercise traffic and commerce: however, it says not a word of being allowed to carry Spanish property (there being then war between Spain and Portugal); and what is actually stipulated, if it determines any thing, determines against the full freedom of neutral commerce, when it prohibits the English from carrying any merchandize direct from the ports of Portugal to those of Spain.† Those who contend for the unlimited

* Schlegel, 56, 57. † Dumont Corps Dip. 11, 238.

right

right of trading upon the same footing as in times of peace, and who cite such treaties as these in support of that doctrine as a point of the conventional Law of Nations, must reconcile this incompatibility if they can.

From what has been remarked, and the cursory examination we have given to the very authorities which our opponents in the argument have adduced, little more perhaps might be thought necessary on the subject. It is quite sufficient, it may be said, to have beaten down the authority of every single case, and every treaty which has been brought forward, and to have shown how little warrantable are all the deductions that have been drawn from them. There are in truth, however, a great number of treaties which actually do contain stipulations in favour of the principle, more especially in latter times; and they have multiplied greatly since the Armed Neutrality of 1780, though intersected with many exceptions in point of fact, and many incongruities of conduct. But as an accession to them has been uniformly refused by this country, which has scarce ever departed from what it calls the authority of the natural law on the subject, supported by usage where there are no treaties; as strange misconceptions of that usage, have crept into the works of civilians, as respectable we see as those which we have been examining; as some discrimination is necessary in drawing proper inferences from the vast body of commercial treaties that exist, arising from the general state of the laws of commerce at different times, the different relations and connections of princes, and the variety of character, and views in public men; and as, besides, it must ever be an important object in a treatise of this kind, to give some clue to a matter so apparently entangled,—it will perhaps be right to set before the reader, as far at least as lies within the compass of very confined powers, how the matter stands in the treaties of the last four hundred years.

As

As it is acknowledged by Schlegel himself, that the *Consolato del Mare* was the sole law in vigour in the fourteenth century;* and that, during that period and the fifteenth, almost all the treaties were formed upon its principles;† we have a very important datum granted to us, with respect to the earlier conventions; since nothing is more incontestible, than that enemy's property, on board neutral vessels, was by that law confiscable. Bearing this in our minds as the received, acknowledged and universal regulation, where no agreement was made to the contrary, we may, notwithstanding, find some treaties which do make stipulations to the contrary; we actually find some, which expressly confirm it; and many more which make no mention of it at all: and the use which I make of this acknowledgment of Schlegel, and indeed without such acknowledgment, of the known authority of the Consolato, is to establish three propositions of some importance in this diplomatic research. I. That, where the rule of the Consolato is departed from in a treaty, it is an *exception* to the law.—II. Where it is supported by an express article, it is merely affirmatory; and, III. Where it is not mentioned at all, it must be taken for granted, that it is still always acknowledged. The propositions are an inevitable consequence of the mere allowance, that the law was acknowledged in point of fact; and are as simply conclusive, as that the municipal law of a country governs its inhabitants when not referred to in the special compacts they make together, although they may sometimes tie up the law by those compacts, and sometimes give it additional vigour and effect.

Now of fourteen treaties of commerce, which are to be found (doubtless amongst many more, but which I have had no opportunity of seeing) during the fifteenth century,

* Schleg. 57. † Id. 4. Dans les 14me. et 15me. siecles presque toutes les traitez furent faites d'après ce principe.

but

but three make any mention of the case of enemy's property on board neutral vessels. These are the treaties of England and Genoa in 1460, England and Flanders in 1478, and another between the same Powers in 1495; and all three support the rule of the *Consolato*. The first of them was probably meant to correct the indefiniteness with which another treaty, between England and Genoa, had, upwards of thirty years before, permitted the general rights of trading with belligerents. By one of the articles of that treaty, (in 1421) it is stipulated, that in case of war between one of the contracting parties and a third, the other shall be bound to take no share in it; at the same time it is stipulated, that their ships and merchants, with their goods and merchandize, may safely pass and repass to and from the ports of the other belligerent, and there exercise their trade at large, without danger of an infraction of the peace.* Upon a renewal of the alliance, between the two countries in 1460, this probably had been found too large a grant of liberty, consistent with the fair means of defence; and it was then stipulated, that no assistance or favour should be shewn in any manner, direct or indirect; and that, in particular, they should not carry the goods of enemies in their ships. The regulations, concerning this matter, are clear and decisive, and indicate so precisely what was then, at least, thought of the duty of neutrals when met on the seas, in order to avoid contributing to the assistance of a belligerent, and what was to be the penalty of a resistance to that duty, that I will state the passages at length for the exercise of every man's judgment.

'Item quod non liceat de Guerram nobis aut subditis nostris moventi aut moventibus auxilium, favorem, vel juvamen concedere, dare, vel exhibere quocúmque modo,

* Rymer's Fœd. an. 1421.

vel

vel dato colore, clam vel palam, directè vel indirectè dicto tempore durante.

'Nec cariabunt aut portabunt in navigiis eorum supradictis, bona, aut mercimonia alicujus inimici nostri seu inimicorum nostrorum; et, casu quo fecerint, petiti et interrogati per nostros, *dicti Januenses* debent (immediatè et sine dilatione, mediante juramento suo, cui subditi nostri fidem dabunt) veritatem dicere et fateri, quæ et qualia bona inimicorum nostrorum vel inimici ducunt in navibus suis, et illa sine difficultate tradere et deliberare capitaneis, vel ducentibus navigia nostra pro custodia maris, vel aliis subditis nostris quos obviare contigeret navibus dictorum Januensium, ubicumque super mare, recipiendo pro rata nauli sive affrectamenti hujusmodi mercium inimicorum. Et, casu quo *dicti Januenses* sic facere recusaverint, vel juvamen aut defensionem prestiterint alicui inimicorum nostrorum, contra subditos nostros super mare, *licitum erit ipsis nostris subditis eosdem Januenses invadere et depugnare eorum naves, et bona capere et retinere, personasque eorumdem prisonarios accipere et custodire.*' *

From these articles, we see that two very important points, between neutrals and belligerents, were resolved on in the fifteenth century by two of the greatest maritime States of Europe; (for who shall say that the *proud Genoa* was not a very great maritime state at that time?) These points were, that the belligerent, meeting the neutral upon the seas, had a right to enquire, in order for confiscation, after any enemy's property which the latter might carry; that the neutral was bound to specify the property on oath, which, if he refused to do, or specified falsely, (for so in this place may be translated '*juvamen* aut defensionem prestiterint,') it was lawful for the belligerent to seize his ship and goods, and detain the persons of his men as pri-

* Rymer's Fœd. xi. 441, 442.

soners. Not vastly different from this, but greatly more in favour of the neutral, is that old and regularly asserted law which has lately been so much questioned; by which *resistance* to the same right of examination is made also to call down the confiscation of the ship resisting.

The first of the other two treaties that have been mentioned contains similar stipulations, though not in such detailed and precise terms. It is in 1478, between Edward IV. and Maximilian, and states, that the merchants and masters of ships belonging to Flanders—"non adducent aut adduci facient per mare, fraudulosé vel quocunque colore, aliqua bona seu mercandisas inimicorum Angliæ, Hiberniæ vel Calesiæ; et de hoc, quotienscúmque per subditos Angliæ Guerræ operam dantes, fuerint interrogati, tenebuntur facere justam et veram confessionem et declarationem." *

The remaining treaty, containing an express provision in support of the principle, is that between our Henry VII. and Philip, Duke of Austria, in 1495, and is a little more full than the last, and more particular than the first, which has been mentioned, between England and Genoa. The xxiiid. article is as follows.—'Item, conventum est ut suprà: quòd subditi unius principum prædictorum, sive mercatores fuerint, sive nautæ, magistri navium aut marinarii, non adducent, seu adduci facient per mare fraudulosè, vel quorumcunque colore, aliqua bona seu mercandisas inimicorum alterius eorundem principum: et si secus egerint, et per subditos alterius principis guerræ licitè operam dantes super hoc interrogati fuerint, tenebuntur facere veram, planam et justam confessionem et declarationem, cui in ea parte pro tunc stabitur, iidemque interrogantes ulterius scrutamen in eâ parte non facient. Sed si postea eundem interrogatum falsò respondisse con-

* Dumont Corps Dip. iii. par. 2. p. 31.

stiterit,

stiterit, tunc idem interrogatus interroganti, quem per falsam responsionem defraudavit, tantum de suo erogare tenebitur, quantum merces inimicorum per eum vectas, et ut præmittitur, celatas, valuisse constabit.'*

In addition to these four, there are ten other treaties of a commercial nature, between the maritime states of Europe, during the fifteenth century, which stipulate, generally, both for freedom of trade and for perfect neutrality, but which do not mention the principle before us, in express terms. Such are the treaties between England and France, 1475;† England and Riga, 1498;‡ England and Flanders, 1499;§ France and Venice, 1477;‖ France and Portugal, 1485;§§ France, England, Venice, and Florence, 1492;‖‖ France and Venice, 1498; ‡‡ France and England, 1497;†† France and Denmark, 1456;** and France and Spain, 1500.‡

These treaties do not mention the principle, in terms, and are, therefore, according to the propositions laid down, supposed to be built upon it, as the known and acknowledged law of Europe, operating silently, indeed, but with not less effect, than if expressly mentioned in affirmance of the *Consolato*. In the three treaties which entertain the principle, in terms, we see fresh support brought to it, in the most positive manner; and its rigour, so far from being relaxed, is extended, corroborated and asserted, by the introduction of heavy penalties for the now criminal attempt at fraud or resistance. There is no treaty, which I can find, that stipulates anything in contravention of the principle.

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* Id. iii. par. i. p. 322.
† 1 Fred Leonard, 176.
‡ Corps Diplom. vi. 404. § Id. vi. 411.
‖ 1 Fred. Leon. 211. §§ Id. 313. ‖‖ Id. 348.
‡‡ Corps Diplom. vi. 406.
†† 1 Fred. Leon. 394. ** Id. i. 56.
‡ Corps Diplom. 445.

 Thus

Thus far, then, we have steered our course, with certainty and precision, as to the state of the law, to the end of the fifteenth century, and nothing arises, hitherto, to trench upon the mode of reasoning adopted, namely, that the law existing in acknowledged vigour, the silence of treaties, far from diminishing its force, is a proof that no attempts had been made to exempt any one from its provisions. But if this was the case at the end of the fifteenth century, and things continued the same, or pretty much the same, throughout the sixteenth, who is to say, that the least alteration in the law was effected during that latter period?—The acknowledgment of Schlegel himself, as to its state in the fifteenth, it seems fair to extend to the middle of the seventeenth; since, with the exception of the three treaties he mentions, in the previous periods, and which we have proved him to have strangely misconceived, he fastens upon no one historical fact, much less any treaty, forming an exception to the rule of the *Consolato*, until 1642, from which time, as he says, the change began. He, indeed, adverts slightly, as Hubner did before him, to the conduct of Elizabeth, when she sent over Winter and Beal to Zealand, to vindicate, as he says, 'les droits du pavillon neutre;' * but how she vindicated those rights, how little was done for the '*pavillon neutre*,' how entirely it was a case of robbery, acknowledged by the historian of Holland himself, and, therefore, out of all reach of an argument upon the law of nations, has already been too amply shewn to enlarge upon it again.†

The commercial treaties of the sixteenth century, are, comparatively, few; and of those, not one, that I have been able to discover, derogate, in the smallest point, from the rule of the Consolato, confiscating enemy's property

* Schleg. 57.
† Fred. Leon. ii. 198, 383, 458, 583.

where

where found; and as we left that rule, in its full vigour, at the end of the fifteenth, it must be supposed still to have continued in all its strength under every treaty which assumed the regulation of commerce, but which yet did not derogate from a point long so acknowledged and held so sacred. It is no where mentioned, either by way of affirmance or denial, in the treaties, between England and France of 1514, 1525, 1530, 1546, 1564, 1572;* between France and Sweden, 1559;† between England and the Emperor, Charles V. 1589;‡ between that Emperor and Denmark and Holstein, 1544;§ between Denmark and the Hanse, 1560; or Scotland and Holland, 1594.‖

At the same time, many of these treaties contain strong general stipulations against affording any assistance to a belligerent, either directly or indirectly; stipulations, by the way, which we may as fairly use in affirmance of the principle, as our opponents in the argument use the general permission to trade in its derogation. On the other hand also, it was in the sixteenth century, at two several times, once towards the beginning and once towards the end, that the famous ordinances of France, relative to the marine, were composed under the auspices of Francis I. and Henry III. These, as has often been observed, gave the fullest support to the rule of the *Consolato*, and asserted the privileges of belligerents to an extent far beyond what had before perhaps been known.

In this age also, raged to its height that great pretension of belligerents to cut off all neutral commerce whatsoever with their opponents; instances of which are so abundant and strong in the history of every

* Id. 564.
† Corps Diplom. viii. 42.
‡ Id. 274. § 2 Valin, 252, 3, 4.
‖ Rec. des Trait. ii. 303, 459. It is no where mentioned at the peace of Vervins, 1598.

maritime country of Europe, that to enter into their detail, would prolong this discussion to an unbounded length. Grotius took notice of many of them, in the passage in which he gives his sanction to the *Consolato*;* and in general we may observe, that this is in fact the true point of all the strongest examples which are cited against our principles, but which prove nothing as we have seen, except a general right to trade on the part of the neutral, the reasonableness of which no one now denies.

Soon after the marine ordinance of Francis I. was promulgated, some of the neutral Powers felt its severity; and I find, that in consequence of strong representations from the Emperor, Charles V. on the part of his provinces in the Netherlands, and after conferences on both sides, the ordinance complained of was abrogated. But, though the severity of confiscating the ships of friends for carrying the property of enemies was removed, the right to seize that property was no where trenched upon. On the contrary, by the very terms of the regulation published for abolishing the ordinance, it is preserved in all its extent; the punishment of the neutral is alone annulled; and thus while the humanity of the Consolato was perfectly restored, its justice and legal severity were integrally preserved.†

This was in the year 1550, but seven years after the promulgation of the French ordinance, whose rigour was thus

* De Jur. Bel. p. 3, 1, 5, 4, notis.

† Scavoir que doresnavant toutes, & quantes fois qu'on aura faict d'ung coste ou d'aultre aucune prinse, ou arrest, soit en mer, ou par terre de quelques merchandises ou autres biens de quelque qualité, qu'ilz soyent, estans les dits merchandises ou biens trouvez en navires, ou chariotz & autres voitures des subgectz tant dudit Sr. Roy que de nous ou en navires d'ennemis, que du bien ainsi prins & arretté tant par mer que par terre sera seulement declaré confisquié *ce qui ce trouvera appartenir aux ennemis*, ou seulement la marchandise prohibée, & deffendue, & non autre, sans ce que pour l'advenir ladite ordonnance (qui des maintenant demeure du tout nulle. & revocquée) puisse estre alleguée ny mise en avant pour le regard desd. prinses. Rec. des Trait. ii. 689.

softened

softened towards the inhabitants of the Netherlands. But neither was this mildness extended to other nations, nor did it long continue to favour the Flemings themselves; for in 1583, the regulations of Francis I. were restored in all their severity by Henry III. and they never afterwards ceased to be the maritime law of France, except when modified in favour of particular nations, by the express stipulations of particular treaties. It appears also that these laws, hard as they were considered by the Emperor himself, formed a part of his own commercial regulations on the side of the Netherlands; since the language of the regulation avows that it was observed in the dominions, both of the Emperor and of the King.*

We have thus conducted the principle of the Consolato in full, and even in augmented vigour to the end of the sixteenth century; nor, upon the strictest investigation, is it to be found, either from the internal regulations, or the public treaties of the times, that any thing like (I will not say the new principle but) the new pretension, had been hitherto brought forward in Europe. If it had, doubtless the learned and industrious professors of Denmark, the zealous advocates of Holland in various Dutch wars, and the investigating delegates of the King of Prussia in 1752, would have long since pointed them out. It is to be lamented, I think, that the learned civilian, whose assertions we are thus driven to oppose, has contented himself with such very vague and indeterminate language as he has used, in speaking of one of the most important customs of maritime nations, as found in their treaties. He acknowledges, it is true, that the treaties of the fourteenth and fifteenth centuries knew no other principle; but after this,

* Charles, &c. à tous ceux, &c. comme pour faire cesser les plaintes et doleances faictes par aucuns noz subgectz, &c. de la rigeur de certaine ordonnance réspectivement observée en noz pays de pardeca et au Royeaulme de France, &c. Recueil des Traitez, ii. 689.

in pretty marked terms, as was observed before, he says, "il fut en consequence determiné qu'un "vaisseau neutre ne pourroit plus être arrêté parce "que il aûroit abord des marchandises ennemies." * How, or when, this was determined, or in consequence of what, he has not condescended to say: but having mentioned the *fifteenth* century as his last date, he goes on to observe that the greater part of the treaties, after the middle of the *seventeenth*, pursued an opposite line; thus leaving a tolerably large chasm of one hundred and fifty, or perhaps two hundred years, without any definite account, or rather without any account at all, of what was the commercial maxim pursued by its treaties. That account, if this were mere matter of historical enquiry, the library of every statesman would be able to supply; but how will Schlegel seriously answer to this country, to his own, and to his conscience, for leaving so great a space of time in total neglect, in order afterwards to call it by the invidious name of mere antiquated law? The question is immense in its extent, and mighty in its consequences; the Professor's book is read by the governors of his nation, and the nation itself; they have armies, fleets and allies, ready to rush into bloody quarrel, if cause of quarrel is made out; and where so many thousand lives are to play for the stake, great caution and even painful enquiry, one would think, should be exercised, before any thing is hazarded in so stupendous a cause.

From this silence, however, I think it reasonably follows, that even if we were deprived of all light upon the subject, the same confession, on the part of the professor, must continue; and that, with his acquiescence, we may enter upon the seventeenth century also, with the maxim of the Consolato, in the most entire state of diplomatic acknowledgment.

* Schleg. 5.

The

The seventeenth century is a rich mine of history, in all that regards and all that can interest mankind. Nations emerged from barbarism and bigotry; the vastest political objects; concentrated and universal alliances; the elevation of the rights of war and peace into a science, itself a most memorable epoch; a great Republic rising into acknowledged sovereignty; a war, of thirty years, displaying the most ardent gallantry, and the most consummate abilities in generals and statesmen, and ending in a peace, which formed, ever afterwards, the basis of the political interests of Europe; in addition to this, the most shining characters in all the ranges of human activity; Henry IV., Sully, Gustavus, Grotius, Richelieu, D'Avaux, Cromwell, De Witt, Temple, and King William: these are the meteors which every where shine out upon the enquirer into this eventful period!

It may be supposed that such an age was fertile in negotiation upon every subject, and in treaties upon every question. Nor is expectation disappointed. The conventions of these times swell into a size, both in number and length, beyond all proportion to those of preceding ages; and there is scarcely a point of political dispute, much less a principle of political conduct, which is not hunted down and settled in the active negotiations and the laboured treaties, which every where meet us, in our researches, during this wonderful age!

It is, therefore, of no small advantage, in investigating the opinions of so busy and interesting a period, that we have the important datum, to which we have alluded, in order, the better to arrive at truth in our enquiry.

It is to be recollected that hitherto no one treaty has been found, to contravene the stipulation of the *Consolato*. On the contrary, some have been made in its support, and some particular ordinances have gone a great way farther; and, whenever they have been found too harsh for a continuance,

tinuance, the new agreements which worked their abrogation, avoided, with care, the destruction of the original law. Again, therefore, we start from this as a truth; that the rule of the *Consolato* was the rule of the commencement, at least, of the seventeenth century; and consequently, that though many commercial treaties are silent with respect to it, their silence is the effect of acquiescence alone, and they must therefore be supposed to adopt and incorporate it with themselves in the fullest extent. From the year 1600 to 1642, the epoch laid down by *Busch*, and adopted by *Schlegel*, for the commencement of a new law, there seems, even from them, to be no opposition to this. During that interval, fifteen treaties of commerce, or relating to commerce, were framed by the maritime States of those times. Of these, the rule is expressly relaxed in none, was strongly confirmed by five, and is acquiesced under, in silence, by ten. Consequently, according to our principles, they are all of them in favour of the *Consolato*, without a single exception.

The treaties which make no express mention of it, either in affirmance or derogation, and which, therefore, as we contend, are silently acquiescent, are those between France and the Hanse towns, in 1604;* between England and Spain, 1604; in which, however, there is an express prohibition to trade with the enemies of Spain in Holland;† between England and France, in 1606;‡ Spain and Holland, (the twelve years truce,) in 1609;§ Denmark and England, in 1621;‖ France and Russia, 1629;¶ Poland and Sweden of the same year;** Denmark and England, 1639;†† Sweden and Holland, 1640;‡‡ and France and Portugal, 1641.§§

* Recueil des Traites, iii. 19.
† Dumont Corps Dip. x. 34. ‡ Id. 62. § Id. ib. ‖ Id. 320. ¶ Id. 597. ** Id. 598. †† Id. xi. 174. ‡‡ Id. 193. §§ Id. 216.

Those

Those which confirm the Consolato, either by express words or strong implication, are firstly the treaty between England and Holland, in 1625, against Spain; in which Charles I. stipulates, that he will instigate all other princes, States, and communities which are neuter, to discontinue all commerce with Spain; in such a manner, however, as that they shall suffer no loss by their compliance; but in case they will not comply, then it is agreed that all ships in the high seas, *suspected of steering towards Spain*, shall be stopped in order to be searched, without however being retarded or damaged (I suppose in the case where no prohibited property is found), at the same time all other commerce is to be open to them without let or disturbance; and there is an express article, which states that nothing in the treaty is to be considered as any innovation, change, or interruption in the freedom of navigation and commerce, either of the subjects of the contracting parties or other neutral states.*

The next treaty in which this belligerent right is to be found acknowledged, not expressly (for according to us, in a point so uncontested, that was not necessary,) but implied as a well-known law, is that of St. Germains, between France and England, 1632, in which the third article regulates the right of search. "Et d'autant que," says that article, "sous "pretexte de recherche et visite, *qui se pourroient faire* par les "vaisseaux de guerre de l'un ou de l'autre prince, ou de leurs "sujets en mer, des navires marchands, *pour scavoir s'ils sont* "*chargez de merchandises defendues appartenantes aux ennemis*, "&c. &c."† It is needless to point out to persons, acquainted with the rules of reasoning, that *pretexte* must mean the pretence of something lawful; and that *qui se pourroient faire*, is proof that what follows is the *legal* right to search for enemy's goods, which are also here placed in the same rank with *defendues*.

* Id. x. 480, the 21st, 22d, 23d, and 40th articles.
† Fred. Leon. v. 44.

The

The next instance is the treaty between Denmark and Spain, in 1641, in which the fullest rights of navigation and commerce are granted to the subjects of one another, clogged, however, with the most marked prohibition as to the property of the Dutch, with whom the Spaniards were at war, or of any other hostile country. And in order the better to prevent the carriage of such goods, all merchandise whatever, exported from either Spain or Denmark, is to be registered and sealed with the seal, and have the certificate of the country whence it comes; so that Dutch, or any other enemy's property, may be easily discovered; and as such, confiscated: 'comme des marchandises de contrebande.'*

In this period also, notwithstanding what has been said by Hubner, that the Mussulmans of the Barbary States gave greater liberty than Christians, &c. to the exercise of commerce, and allowed the principle in question, I find some treaties not without stipulations of a very contrary nature. In the treaties between France and Algiers, in 1628, and France and Morocco, 1630, a period when the former was the most favoured of the Christian nations in the Mediterranean, the first allows not the freedom of enemy's property until the Algerine shall have taken the ship into port, in order to exact a duty, or toll, upon such part of the cargo:† the last confiscates it altogether; and the stipulation is, that the French vessel shall alone be free.‡

And thus the matter stands in the maritime treaties of Europe, from the time of Edward III. until 1642; when, and not till when, according to Schlegel himself, a new system of commercial regulation was set up. The confession implied by that assertion might probably have spared much of the preceding detail; but as, in all human institutions, much of what is, depends greatly upon what has

* Corps Diplom. xi. 210. Art. v.
† Corps Diplom. x. 559. ‡ Id. 614.

been;

been ; as, in many points, the right understanding of what every day passes is, at least, facilitated, if not entirely generated by a knowledge of the sources whence it flows, and the changes it has undergone ; the preceding research will not be regretted by those who regard the subject with any thing more than temporary views. At the same time, it is not pretended that all the maritime conventions that existed have been here brought together. There are, without doubt, many more ; but these are all which, from such narrow sources as are before me, I have been able to find, and for whose fidelity I am therefore able to answer. It is, however, little probable, that even from those which may, for ought I know, remain behind, any thing can be found adverse to the point we have arrived at ; since, if there was, the Danish civilians, who were so interested in the discovery, would, doubtless, have long since published it to the world : and the mistakes of their zeal in citing such treaties as those of Edward III. and Charles I., and the transaction of Elizabeth with the Zelanders, prove to us at what slight and fragile supports they are willing to grasp ! *

We now, then, arrive at that important period whence, *as it is said*, a new principle of government for Neutrals and Belligerents takes its progression. But, although it is indubitable, that, from that time, downwards to the æra of the first Armed Neutrality, there are a vast number of exceptions to the rule which, as we have seen, had hitherto reigned paramount to all exception ; yet we shall probably hesitate a very long time before we can lend our belief to the assertion, that the contrary rule became the rule of Eu-

* See pages 51, 52.

rope.

rope. Even the ground for the supposition in the outset is weak; for, allowing all possible credit to the soundness of the conclusion, as to the real thing which is stipulated by treaty (a conclusion, however, which past experience would, perhaps, induce us to deny), the existence of but five and thirty treaties, during a period of one hundred and thirty-eight years, would alone make us doubt of their constituting so vast a majority as must make a rule. But when we add to this, that it was a period the busiest, the most intriguing, the most fertile in every sort of alliance, and in opportunities to draw forth every sort of maritime interest; the period, in fact, of Europe's history, when the Maritime Powers began first to assume the lead, where formerly they had been merely secondary to the Continental; the period when Holland was at its zenith; when Prussia was struggling into notice; when France became commercial; when Russia became maritime; when all the States, whether continental or maritime, came to be linked together in such close connection, that the slightest movement of one was the signal for conventions amongst all the rest: under these characteristics, and during so great a length of years, that so small a number of treaties should form a decided and constitutional majority, is an assertion which we should be induced to pause long upon before we gave it our implicit belief! That there may be five and thirty treaties, from the year 1642 to 1780, which are favourable to the principle, I am not disposed to question, though I know not the fact; that they form a majority, and that a very great one, so as to give the *general rule* of Europe, is the point to be discussed; and that point must depend upon the same view of the fact which we have all along been taking of it in the earlier parts of the history. In particular, we must still proceed to the enquiry with this clear guide in our minds; that as, hitherto, for the space of at least four hundred years, no one convention had been made in derogation of the *Consolato del Mare;* as, on the contrary, many treaties,

as

as we have seen, were made directly in its affirmance; and as what alterations were attempted by the ordinances of particular nations, were all of them built upon its extension, to a degree of even unjust severity, it is impossible not to say that, in 1642, it was still the great and acknowledged rule of Europe: consequently, in every treaty which did not except against it, whether mentioned or not, it must still be taken to be the known law. Now, in surveying the treaties of the important period from 1642 to the peace of Utrecht, we do find that some have departed from it; *giving, however, very marked compensations;* more have confirmed it expressly, and still more have confirmed it by their silent acquiescence; for the better ascertainment of which it will be right to proceed chronologically, though cursorily, in our review of the treaties.

The first upon record, which I find after the new period commences, is certainly not of the complexion of those which *Busch* must be supposed to mean. It is that between France and Courland, 1643, which gives to the latter the fullest freedom of commerce and navigation through all her ports and seas. There is, however, a special article, which, in terms, prohibits the Duke from availing himself of the liberty thus granted to assist the enemies of France, by carrying to them any sort of merchandise;* which is obviously a much greater extension of the belligerent claim than if it had been confined to the right of seizing the property of the enemy himself.

The next in order is the treaty of Christianople, between Denmark and Holland, 1645,† in which, though made expressly for the arrangement of commercial disputes, no mention whatever is made of this neutral claim. The next is between Denmark and France, November 1645; a close

* Corps Diplom. vol. 5. 210. † Id. 312.

and

and commercial alliance; in which, however, there is also silence as to the claim. But the stipulation is express;—that neither power shall afford help to the enemy of the other, directly or indirectly; and the twelfth article in particular acquiesces under the antient rule, when it states, that the freedom of commerce consists in maintaining things exactly *as they are*, in the western and northern oceans, and in the Baltic sea.*

The next is the treaty of Paris, between France and Holland, 1646; and as it contains an argument of some little nicety, as to its construction, it deserves to be mentioned at some length. It will be recollected that the ordinances of France at this time confiscated not only all enemy's property, found on board neutral vessels, but the vessels themselves, as good prize. This had been already felt, and altered, on the representations of Charles V.; and, an alteration was now again solicited by the United Provinces. The preamble, therefore, states, that many complaints having been made, that the ships of the King were in the habit of seizing merchant vessels, in which enemy's property was found, and confiscating *the ships themselves* as good prize, according to the marine ordinance of the late King Henry III.; and the King being disposed to apply the best possible remedy to the *inconveniences attending the execution of this order;* 'et se relâcher,' to use the words of the treaty, 'de la rigeur 'd'icelle *pour quelque tems* en faveur des dits Sieurs les Estats, '*à la prière* qui luy en a esté fait par le Sieur Osterwick, 'leur Ambassadeur,' names his Commissioners to confer with the States, who determine upon the following articles.†

Now, to pause here a moment, it is impossible not to be struck with the marked tone of the treaty, as it regards a very important point; namely, that the whole is condescen-

* Corps Diplom. 328. † Fred. Leon. v. 223.

sion

sion on the part of the King; and as such, of course, from their very agreement to the treaty couched in these terms, accepted by the States. He relaxes his rule, for a time only, in their special favour, and at the prayer of their Ambassador! Not a sentence is breathed concerning a liberty or right, under the Law of Nations, to the abrogation of this ordinance; but all is pure matter of conventional relaxation from an admitted rule, at least of France, and to exist only for a time. And what is it that is determined? 'Qu'en attendant 'que l'on ait fait un bon réglement, on surseoira l'execution 'des articles de l'ordonnance du Roy Henry III. de l'an '1584 sur le fait de la marine, portant que les marchandises 'appartenantes aux ennemis, donnent lieu à la confiscation '*de celles des amis*, et ne sera plus observée n'y pratiquée 'à l'egard des sujets des Sieurs les Estats Généraux des Pro-'vinces Unies des Pays-Bays, pendant le temps *de quatre* '*années*, en telle sorte que les navires qui trafiqueront avec 'la patente de l'admiral des Provinces Unies la mer Medi-'terrannée et du Levant, et sur l'ocean du dit admiral, ou 'des villes et lieux aux sujets desquels les dits navires appar-'tiendront, seront libres, et *rendront aussi toute leur charge* '*libre, bien qu'il y eust dedans de la marchandise; même des* '*grains et légumes appartenans aux ennemis:* sauf et ex-'cepté toutefois les marchandises de contrebande.'*

According to the well-understood language of the present day, if this stood alone, the phrase, 'rendront aussi toute 'leur charge libre,' would convey very clear and definite ideas. De Witt and the Dutch had little doubt about it eight years afterwards, when it came into dispute; and they understood it as, we must own, with modern ideas, all Europe would now understand it to mean, that not only the ships and property of friends, but the property of ene-

* Id. Ibid. Artic. I.

mies also, should be free from confiscation. Allowances, however, must be made for novel language, (for at the time it was new); and, at all events, deference must be paid to the intendment of both parties; and if the Dutch made use of one interpretation, another was put upon it by the French; the former yielded their object, the latter never did. In the year 1653, De Witt endeavoured, through Boreel, to negotiate a great commercial treaty with France, in which he laboured hard to be allowed his maxim of '*Free Ships Free Goods*,' in the modern understanding of the phrase; that is, that enemies' property should not be seizable. But Boreel informed him, that he never could obtain it under that construction of its terms; and then, for the first time, at least upon record, after the signing of the treaty of 1646, it appears that the French Government had very different ideas from De Witt and Boreel of what was really meant by its important first article. Being inserted, said the former, merely in order to suspend the effect of the ordinance of 1584, its interpretation was to be guided entirely by the subject matter contained in the ordinance; and that being to protect an old and known law, by adding to the breach of it a heavy penalty which had never before accompanied it, and which was now complained of, any agreement to remedy the inconvenience of the ordinance could go no farther than the inconvenience mentioned: it might take off what was complained of, namely, the penalty, but could never abrogate the law itself. Consequently all that was done, was to restore things to their old situation before the ordinance, which was, that the enemy's property in the ship might be seized as of old, but that the ship itself, and all neutral property on board, were to be considered as free; and this was all that was meant, when it was said that the ship should be free, and render also its cargo free: thus applying the word *free* to the

the ship and neutral cargo alone, which were not so considered by the severity of the ordinance.

I own, this reasoning appears to me to be convincing; and the only cause for doubting of its soundness seems to arise from the long habit we have been in of annexing a particular and different interpretation to the phrase, *Free Ships Free Goods.* At this period, we have no ordinance of 1584 to encounter, as the ground which gave rise to the dispute; but having been accustomed long to consider it as an abstract proposition with a defined meaning, totally distinct from any historical circumstance, we, therefore, by a prejudice by no means unnatural, divert the leaning of our minds to one, and only one, interpretation. Placing ourselves, however, in the situation of the French Ministry in the middle of the seventeenth century, and only eight years after the relaxation of the old ordinance of 1584, we shall not, perhaps, consider the dispute as so clear in favour of the Dutch. One argument, also, there is on the side of the good faith of the French Government, that grain and provisions, in those times, fell in amongst the general articles of contraband; the carrying of which being, when not stipulated for to the contrary, a cause for seizure; the exemption from it, in the case stated by the words of the article '*même des grains et légumes*,' points entirely to the ship and the neutral part of the cargo. When this difference arose also, it was not a sudden, or temporary change, to serve a particular purpose, in interpreting the treaty of 1646, but a discussion, in the outset, of the meaning of terms to be inserted in a much larger treaty of commerce, and for a much longer time, then in the act of being framed. Boreel, it appears, had presented the project of the treaty containing this self same article in terms; and had written, as it would seem, to De Witt, to inform him that his project was not opposed: he was surprised, therefore, to find that he had been totally mistaken when he learned, after having announced it to De Witt,

that a very different sense was put upon those words; and, hence, when the Pensionary replies to his second information, he says, that it appeared to him, either that the French Ministers were mistaken in that construction, or that Boreel himself had represented the thing in a wrong light in his letter; since, by the detail of the article, though the phrase is not there, the rule of Free Ships Free Goods '*y est nettement* exprimée.'

Be this as it may, the French, as we see, interpreted it differently, not only in the project of the new treaty presented by Boreel, but also in the old one of 1646; and, as he says himself, had also put it in practice, 'à la vérité fort mal;' and, therefore, as they were always at liberty to put the same explanation upon it, he advises a more clear and precise form of words, unconnected with the ordinance of Henry III.; and proposes the introduction of the maxim of 'Free Ships Free Goods,' in terms, with sufficient explanations to put it out of doubt, according to the Dutch sense of it, but in which proposal he did not succeed; and it was, for some years afterwards, altogether rejected by the French.*

The history of this discussion, of course, will explain what was meant by the next treaty we find on the subject, May, 1655, between France and the Hanse Towns; the third article of which is precisely the same; the duration for fifteen years.† But, though the form of words is so particular, and, apparently, so strong against the rule of the *Consolato*, it is impossible, after the pointed discussion as to their meaning, to have any doubt of what was offered, and what was accepted. The French, who had continued so firm to their own interpretation with the flourishing

* See the whole of this dispute, in the Lettres et Neg. de De Witt, tom. i. 80, 81, 104, 105, 108, 129.

† Corps Diplom. xii. 103.

Dutch

Dutch Republic, that the treaty in contemplation was entirely dropped, would hardly, within a twelvemonth almost, give up the whole of their objection in favour of the declining Hanse. Whatever, therefore, was the form of words used, there can be no doubt as to the meaning of these two treaties; and, if these are included amongst the thirty-five enumerated by *Busch*, as trenching upon the *Consolato*, they ought to be instantly expunged. In the space of five years afterwards, Denmark and Sweden made two treaties of alliance and commerce together; one in 1658, and another in 1660; neither of which makes any mention of an innovation on the *Consolato*;* and Spain had formed another with the Hanse Towns in 1647, in which she gave them the fullest liberty of commerce; with the strong exception, however, that they should give security by registers, certificates and other modes, not to bring Dutch property into any of the places within her jurisdiction; a pretty forcible example, that the rights of commerce were not in the treaties, even of this time, enjoyed in the same manner as during peace.†

What De Witt himself thought of the rights of Neutrals, when his own country was belligerent, may be collected from the famous placard published by Holland, in 1652, upon the approaching war with England. Not content with interdicting all carriage by her own subjects of neutral property into the ports and harbours of her enemy, she gives notice to Neutrals themselves, though in their passage to other neutral countries, not to be found on the coasts of England, or its dependencies, on pain of incurring suspicion; and, if found to be laden 'en partie ou en-'tiérement de quelque munition de guerre *ou de bouche*,' on pain of being brought into the ports of Holland, and confiscated by the Dutch Admiralty.‡

* Fred. Leon. v. sub. an. † Corps Diplom. xi. 424.
‡ 12 Corps Diplom. xxxvii.

About this time, the famous treaty of Upsal was made between Cromwell and Christina, under the auspices of Oxenstiern and Whitelock. It acknowledges the rights of commerce to the full; it expressly states, that although the laws of friendship forbid either of the confederates to assist the enemies of the other, yet it must by no means be understood, that that confederate, who is not at war, shall carry on no manner of trade or navigation with those enemies. Yet, while in this spirit of complete neutral independence, the very next article, by glancing at it cursorily, and as a thing known, acknowledges the extent of our rule, in perhaps a stronger manner than if it had contained an express provision on the subject. 'Lest such free navi-'gation,' says the article, 'should be prejudicial to the 'confederate that is at war, *and lest hostile goods and wares* '*should be concealed under the disguise of friendship;* and, 'for removing *all suspicion and fraud*, passports and certi-'ficates shall be provided.'* It is needless, I think, to point out the strong and pronounced manner in which the belligerent right is thus acknowledged; it is only necessary to add, that in the two treaties which followed hard upon this, one in 1654, the other 1661, the same sort of language is held, both with respect to Neutral and Belligerent.†

Several treaties were about this time framed, which, for brevity's sake, may be mentioned all together, though of different dates, because all come under the same class of perfect, though silent acquiescence. These are,—those between Cromwell and the Dutch, 1654;‡ Cromwell and France, 1655;‖ Denmark and Sweden, 1658, and another, 1660 (mentioned before);§ Sweden and Moscow,

* Chalmer's Treaties, i. 25, 26. † Id. xxxiv. 53.
‡ 12 Corps Diplom. lxxvii. ‖ 5 Fred. Leon. xi.
§ 12 Corps Diplom. 208.

1661;*

1661;* England and Prussia, 1661;† England and Denmark, 1661;‡ and England and Holland, 1662.§ In none of these, though containing general stipulations, both for freedom of commerce and the withholding assistance to enemies, is the principle in terms either confirmed or denied; and, as it did not; in those times, from the abundant proof we have given, stand in need of being confirmed, we say, that not being excepted from, it was sufficiently acknowledged.

In the treaty between England and Holland in particular, it would have been denied upon a principle of right, could the age have allowed it. In the proposal for a maritime treaty, delivered by Nieuport, the Dutch Ambassador to Cromwell's Government, December, 1654, he endeavours to obtain it by yielding, in the same sentence which contains the proposal, a right instead of it, which seems truly founded in the most impartial neutrality. This was, that the goods of friends, taken on board the ships of enemies, should be restored; and the sacrifice of this, in the above proposal, accompanied the stipulation with respect to the other, without, however, being accepted by the ministers of Cromwell.‖ At the same time, the Dutch continued their negotiations for its accomplishment *upon these terms*, in other Courts; and, at length, had obtained it from Spain, in 1650; from Portugal, in 1661; and from France, in 1662. In the twenty-fourth article of the treaty, 6th August, 1661, the one right is set against the other in the following very clear and precise terms.

'Bona quælibet ac merces, sive ad dictos regem ordines-
'que spectabunt sive ad utrumvis populum, si navibus alte-
'rutri parti inimicis hostibusque creditæ ac in iis depre-
'hensæ fuerint, non minus quam naves ipsæ in prædam

* Corps Diplom. 364. † Id. ib. ‡ Id. 400.
§ Id. 426. ‖ 3 Thurloe, xxxiii.

 'cedant,

'cedant, ac fisco occupantium addicantur: merces vero ac 'res quæcunque ad partis utrius libet hostem pertinentes, 'regis ordinumque jam dictorum aut utriuscunque populi 'navibus impositæ, in eas fisco nil juris esto, adeoque nec 'detineantur, nec possessoribus intervertantur.*

This article is almost literally translated in the thirty-fifth of the treaty which followed with France in April 1662; † and thus, it was, for the first time in Europe, and full twenty years after the commencement assigned for it by Busch and Schlegel, that the maxim of *Free Ships Free Goods* began, at length, to exist.

We have this important fact, therefore, with respect to the introduction of this supposed *natural* right; that it never was started nor obtained as such; that it was not acquired by force, as a thing calling upon all neutral nations to confederate themselves for its accomplishment; neither was it a free grant from a sense of justice in Belligerents; but it was established by conventions that stipulated mutual advantages, and, in particular, was accompanied by the voluntary sacrifice of a right, really emanating from the Laws of Nature, and long acknowledged by the Law of Nations.

The right of an impartial Neutral to continue his trade with each Belligerent, so long as that trade can in no respect do injury to either, is certainly, from the first principles of justice, uncontested and incontestable; and it would be difficult to shew how injury is done, or what interference there is in the war, by placing such goods as are sacred, from their neutrality, and have, therefore, a right of passage all over the world, under the care and protection of a belligerent flag. Something in point of prudence may be urged to prevent their being exposed to the accidents of war; but if

* 12 Corps Diplom. 369. Artic. 24. † Id. 415.

the

the Neutral chooses to risk this, it is impossible, I think, to conceive a well-founded reason for supposing, that any confliction of rights between him and the other Belligerent can arise from the procedure. This, then, seems an innocent, and, therefore, a natural right in the Neutral; as such it formed one of the provisions of the *Consolato;** and as such it was approved by Bynkershoek:† and amongst commercial nations, who were themselves not carriers, much fair advantage would, no doubt, arise from its exercise. In the times before us, for example, the Portuguese were commercial, but not great carriers; while the English had many manufactures, and were also very great carriers: and they had fleets likewise to defend themselves, and those who would entrust their property to their care, against almost all attack. It was, therefore, greatly to the interest of Portugal, that this right should be enjoyed, in case of a war between England and Holland. In the same manner, France was, perhaps, at that time, still less in the habit of freighting ships than Portugal; but she had great and esteemed manufactures, and natural produce in general request; and it would seem, that, in case of such a war, it would have been impolitic to grant to Holland, that if she chose to continue to lade her merchandise on board of English vessels, they might become lawful prize to them, in common with the vessels themselves.

This, however, we see, was done both by Portugal and by France, in the treaties we have been contemplating, and in the very article and the sentence itself, in which they stipulate for the principle of Free Ships Free Goods. Those, therefore, who contend that the principle is acknowledged, *by treaty*, to be a natural right, have to account for the pointed and incompatible circumstance, that what was stipulated in the very same moment of time is, incontestably

* See page 33, 33.
† Quæst. Jur. Pub. cap. xiv.

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an invasion of natural right. Certain, at least, it is, that those who contend that the commercial rights of Neutrals are in no wise broken in upon by the event of war, but are exactly the same as in times of peace; and this is acknowledged by the majority of the treaties, or, as they say, by the conventional law of Europe; must have either rashly hazarded this assertion, or must reconcile the insurmountable incongruities thus peculiarly presented to them in the first two treaties, which contain an express stipulation for the maxim in discussion.

The true reason of these stipulations is, in fact, to be found in the convenience of Europe, and not in any wild wish to uphold a law of natural justice. That law would and did decide upon both points, according to the ancient usage; but from the growing and multifarious commercial connections of Europe, it was sometimes made a question, whether it might not be better to beat down all difficulty and entanglement, by sacrificing both the belligerent and the neutral right; and hence they enacted, as it were by positive contracts, that in future there should be no distinction as to property, but all should obey the character of the ship.

We see, then, in what trammels, and how little partaking of that absolute freedom of navigation, founded, as it is said, in natural law itself, the principle before us was first introduced. Those trammels have ever afterwards continued, and the whole proves very clearly, that both the one and the other were in direct derogation of natural justice, and simply matters of the purest convention. That it was convention, even in the minds of those who framed the treaties, must, I think, be clear; since the new arrangement, beyond all contradiction, overturned the received and antient usage; for it must be remembered, that *both* the provisions of the *Consolato*, which, as we have seen, had ruled the maritime conduct of States for ages, were thus reversed.

reversed. And as one of them must be allowed, most particularly by the champions for neutral privileges, to have been founded in the clearest natural right; it must be supposed, that the other, which shared its fate, partook of its nature also. For, otherwise, the language of the assertors of commercial liberty must and can only be this:—We wish to destroy the tyranny of unjust usage and antiquated maxims, and to restore our trade, which has so long been fettered, to its ancient and natural liberty: we therefore abrogate the principle of seizing enemies' property in neutral vessels, which was an arbitrary invasion: and, from our hatred to arbitrary invasion, we also abrogate the rule of allowing neutral property on board enemies' vessels to be free, which was founded in justice.—I see no possibility of avoiding this decisive dilemma, in those who can imagine that the introduction of the maxim before us into treaties was the mere effect of the '*progrès des lumiéres*,' bringing back things to the state of natural liberty.

Without descending, therefore, to the folly and blindness of enthusiasm in a treatise of law, let us place the matter really upon its right footing, namely, that of particular agreement chaining up the Natural Law; and, like all other agreements of that kind, binding only such parties as have contracted, and not amounting, nor capable of amounting, (even if the majority of treaties were far greater than stated) to the force and power of forming a law for those who have made no agreement against it. Such, it must be remembered, is the vain and visionary pretension.*

In using this language, however, let us not be deluded into the supposition that the subject has occasion for it. The fact still remains to be settled from diplomatic history,

* Schleg. 56.

whether

whether the treaties of this sort do actually exist in such universality as upon their own principles to warrant its assertion. In looking over the treaties, from the last that have been mentioned to the year 1715, I indeed find several that are couched in the same terms. They are those between France and Spain, 1659, the Pyrennean treaty;* France and Denmark, 1662;† France and England, 1667, the treaty of Breda;‡ France and Holland, 1678, the treaty of Nimeguen;§ France and Holland again, the treaty of Ryswick;‖ Sweden and Holland, 1667;** England and Holland, 1668;†† Sweden and Holland again, at Nimeguen;‡‡ France and England, at Utrecht;§§ France and Holland, at the same place;‖‖ and Russia and Holland, 1715: §‖§ in all, eleven treaties, composed by seven Powers.

But although all these, in their treaties, some with one and some with another, acknowledged the principle on particular occasions, and with particular parties; yet they did not by any means acknowledge it in common, as binding upon all of them intermingled together. Though two, for example, might contract for its observance, whenever their own particular transactions came in contact, each might contract with others, either for the contrary stipulation, or for something less; or might leave the matter wholly untouched. Thus France, though she re-

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* 1 Jenkinson, 113. art. xix.
† 5 Fred. Leon. art. i. ii. iii. iv. viii.
‡ 12 Corps Diplom. 439.
§ 5 Leon. art. xiii. xxii.
‖ 12 Corps Diplom. 388.
** Id. 13. 37. art. viii.
†† Id. 13. 75. art. x.
‡‡ Id. 15. 440. art. xxviii.
§§ Id. 15. 218. art. xvii. xxvii.
‖‖ Id. 377 art. xxvi.
§‖§ Id. 471. art. ix.

versed

versed the rules of the *Consolato* in her treaties with England and Holland, stipulated for the exact observance of that regarding enemies' property, in her treaty with the Hanse towns in 1716. It was indeed so exact an observance, that if the property was in such large quantity as not to be conveniently laden on board the capturing vessel, the Neutral was bound to attend her to the nearest port in France for the discharge of the rest.* Thus Denmark, though she contracted to follow the maxim with France in 1662, implied her acquiescence under the old law with England in 1670;† and absolutely renounced the French carrying trade by treaty with England and Holland in 1691.‡ Sweden too, who had agreed to the principle with Holland at Breda, was at that moment under treaty not to pursue it with England.§ And though Spain had fallen in with it, from the Pyrennean treaty to the peace of Utrecht, with France and Holland, yet with England in 1667,‖ and with the Emperor in 1725,¶ her stipulation was for the converse of the maxim alone; namely, that neutral goods on board enemies' vessels should be confiscated.

Clearer cases of mere private compacts can hardly be conceived than are exhibited by these examples of the diversity of the stipulation entered into by the same countries. Little, therefore, could they feel themselves bound by any general rule, still less by a general rule of natural and universal law. But what shall we say to that vast number of treaties expressly commercial, or including commercial re-

* Corps Diplom. 15. 479. art. xxii.

† Id. 7. part. i. p. 132. She implied it by stating, that though each party might trade with the enemies of the other; yet, in order to prevent the fraudulent concealment of enemies' property, passports, &c. should be given. See articles xvi. and xx.

‡ Corps Diplom. 14. 293. 295. art. iii.

§ By the treaty, 1661.

‖ Corps Diplom. 7. part ii. 27.

¶ Id. 16. 115.

 gulations,

gulations, which, during the very times when the principle was canvassed, bargained for, admitted or rejected by these different maritime States, passed the whole over in absolute neglect? As the reverse of the rule had hitherto incontestably governed Europe, are we to suppose that these were to give way at once in silence, and without the least public indication of such a change, to the comparatively few instances of alteration which had appeared? Or, are we to suppose, that these instances formed the exception which, as is seen, it required new and marked language to introduce? The negotiators of the novel maxims pushed it with the utmost activity, and at first had nothing but difficulty to encounter. It was Holland that made the signal for a change; Holland, who filled every maritime Court with proposals for the introduction of the new principle; Holland, whose existence almost depended upon it: while other nations, reposing on their own resources, balanced long upon the innovation, and rejected, at first, all attempts at its completion. It is to be observed also, as a consideration of the first weight, that during the whole of this period, the question thus agitated was uniformly entertained in almost every one of the works of public law which so frequently raise and illustrate the literary character of those times. The ablest civilians and statesmen were employed upon what was thus generally started; and their opinions, as we have seen, inclined uniformly to the support of the existing law. It seems, therefore, almost impossible, by any magic of reasoning, to come to the conclusion, that where a law has existed for four hundred years, and is still supported in the writings and opinions of learned men, and where a vast body of treaties are daily forming, that take no notice of the change; it is difficult, I say, to conceive that a smaller number of conventions, acknowledging a new regulation, can form any

thing but an exception: certainly it cannot amount to a contrary rule itself.

We have seen that the treaties which introduce the new maxim, from 1642 to 1715, amounted to twelve; we have seen that those which stipulate either different or contrary conditions are seven. There are, besides, 31, which make no mention of the rule one way or the other; and all these, we contend, bottom themselves upon the old law, which we say the countries making them had never relaxed, except by express convention.

Of these treaties we have already enumerated eight, which were formed about the time that gave birth to those in which the maxim was first acknowledged in Europe. And there are, therefore, twenty-three which are wholly silent with regard to the stipulation. The first of these is the treaty between Denmark and Holland, in 1666, made to ascertain the rights of their mutual commerce, and expressly to repel the gross invasion of the neutrality of the former, by the English, at Bergen. The first article makes an enumeration of pretty strong acts of violence, on the part of the English fleets and cruisers; in particular are mentioned the seizure of Danish vessels sailing even to neutral ports, the cannonading of Danish forts, and other examples of unlawful attack; but nothing is glanced at with respect to any seizure for carrying enemies' property, which, amidst such prompt and rash acts, must, doubtless, have happened. Nor does it form any part of the league to prevent this old belligerent right on the part of England; or to stipulate for its dissolution on the part of the contracting Powers. At the treaty of Breda, between England and Denmark, although the question was much agitated, and the maxim agreed upon between various of the other Powers, it passed, as to them, in the same acquiescent silence.

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In the same year, 1666, France renewed a treaty with Algiers, in which no mention was made of it; at Breda* it was not touched upon by England or Spain; nor afterwards, in 1670:† nor in 1669, by England and Savoy.‡ It was equally disregarded by England and Sweden in 1666; by another treaty in 1674;‖ and by France and Sweden, in 1672.§ At Nimeguen, it was neglected by Sweden and Holland, although the Dutch proposed, and obtained the right of coasting from one enemy's port to another.** At Brussels, previous to Nimeguen, the agreement upon coasting, between Spain and Holland, proves nothing, by proving too much; for it is allowed even to their own subjects, either in their own, or neutral vessels; and at any rate, the maxim immediately before us is left untouched.†† So also it is in the treaty between England and the Porte, in 1675;‡‡ in that between England, Sweden, and Holland, in 1700;‖‖ and between Holland and Denmark, in 1701.§§

The Dutch treaties with the Barbary States, with Tripoli in 1703, with Tunis in 1708, and with Algiers in 1712,*†* leave the maxim alike in silence; in those between Portugal and Spain 1701 †*†; and Portugal and England 1703, it is equally disregarded.‡*‡ Thus it is also in the treaty between England and Dantzic in 1706;‖§‖ and of Utrecht in 1713; and by the second treaty 1714, it was left unprovided for by England and Spain.§‖§

This last treaty renewed the treaties of 1667 and 1670, in which 'Free Ships Free Goods' was not mentioned;

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* 5 Fred. Leon. † 2 Chalmers, v.
‡ Corps Diplom. xii. 119.
‖ Id. vi. iii. lxxxiii. and vii. p. 1, 280. § 5 Fred. Leon.
** Corps Diplom. xiii. 440. †† Id. 325.
‡‡ Id. T. vii. p. 1, 297. ‖‖ Id. vii. 1, 475. §§ Id. xv. 32.
† Corps Diplom. 15. 137. 232. 295. †*† Id. 31.
‡*‡ 2 Chalmer's Treat. 296. ‖§‖ Chalmer's Treat. 1. 100.
§‖§ Corps Diplom. 15. 393. 409.

though

though it was stipulated in terms that the converse should be allowed. We must remember all along, that whenever the maxim of Free Ships Free Goods was admitted, it was always accompanied with the reversal of the other provision of the *Consolato*, that neutral property on board enemies' ships should be free; and I am aware, that in some interpretations of very learned men it is said, whenever this reversal is stipulated for, which it frequently is, the other maxim follows along with it as a thing of course. This they ground upon the reason which has before been stated, that both principles take their rise in convenience; and that, in order to avoid the confusion, delay and chance of injustice which may arise in ascertaining the different national characters of the owners of the cargo, it is better to sweep away the whole at once, under the national character of the ship.

Now, I own, the reasoning does not appear convincing; since, though the argument, from convenience for the one or the other principle, or both, may be perfectly sound, yet that intimacy of connection and indissolubleness of union between the two, which alone can render them inseparable, does not appear to exist, so as to make the allowance of one an inevitable cause for allowing the other. That country, indeed, which stipulated for the one, might, very probably, be *disposed* to stipulate for the other; but courts of justice could not assume, from the mere probability of that disposition, that both were, in fact, granted, where only one was mentioned. Rather, on the contrary, we might suppose, that, from their very affinity, the prohibition of the one, without the mention of the other, is a strong proof that the latter was never intended to be inserted; and thus, in the treaty of Utrecht renewing that of Madrid, 1667, between Spain and England, which is the only one between these countries which makes mention of either principle, it must depend entirely upon what is there stipulated: and as the con-

verse only of the maxim we are discussing is there to be found, we are warranted, I think, in saying, that between these two great maritime States the maxim itself is not allowed. So, at least, does a great authority understand it, when he says, in his Discourse on Neutral Nations, that no article can be found in the Spanish treaty, which grants the privilege in question to that nation.*

At Utrecht the point was left untouched between France and Portugal; and thus, while thirteen or fourteen treaties, from the epoch of 1642 to the complete termination of the negotiations of Utrecht in 1715, are to be found, stipulating for the maxim in question, whose universality in these times is so boasted by Schlegel, seven are to be discovered, framed expressly on the opposite rule; and no less than thirty-one, by their silence, give it, under all the circumstances, a most direct negation.

In this place, I cannot help recurring to what may be esteemed a considerable authority on the subject, busied as we here are in negative proofs. The Abbé Mably, in a book professedly treating of the Droit Publique, as drawn from the treaties of Europe, gives large place to the whole subject of commerce, both in the abstract, and as it is found in treaties; and he presents a kind of conspectus, under the title of 'Conventions Générales touchant la Navigation et le Commerce;' under which he arranges all that he conceives may amount to a general rule, concerning commercial stipulations; and these he collects from the universality in which they have been laid down by the conventions of Europe. But, though he enumerates all that has been demanded on the one side, and granted on the other, as it regards the maritime rights and duties of States; though he mentions all that has been settled by compact, respecting refuge in the ports of friends from tempests or pirates; or

* The Earl of Liverpool's Disc. p. 20.

respecting

respecting the manner of exercising the right of search, the extent of embargoes, the number in which armed ships shall enter each other's harbours, the nature of contraband, and the jurisdiction of Admiralties; though, to come nearer to our subject, he in particular takes notice, that it has been determined, that the goods of friends shall partake of the character of the ship which covers them, and be alike confiscable in the Court of Prize; yet, strange to say, the converse of this wholly escapes him, and he takes not the least notice, as a point of law resolved on by treaties, or resolved on any way, of the maxim of 'Free ships Free goods.' This negative proof of his opinion comes, at the same time, with greater weight, because it is in the very part of his work in which he sets up the visionary question as to the policy, humanity and justice, of making war upon private property; leaning in this to the fanciful and wild scheme of a Military War, and a Commercial Peace. Consequently he stands classed eminently in the same rank with those who wish to carry the rights of Neutrals to a height without limit; and his authority by them, at least, must be considered as indisputable.*

The treaty of Utrecht, and the conventions which grew immediately out of it, make perhaps the greatest epoch in the regulations of Europe during the last century. Great interests, of all kinds, were there settled, forming the basis of most of the treaties which were afterwards framed, and bringing the numerous subjects of dispute in the century before to some sort of order.

The wars and negotiations, and final arrangements of interest, which employed nations for the rest of the age, although they gave great scope to the Governors of States, did

* See Le Droit Pub. de l'Europe, fondé sur les traités, par l'Abbé Mably. 2. 459 to 488.

not, therefore, wear that varied sort of complexion, or afford that immense diversity of great general objects, which produce changes in long established and long respected rules. The Kings of the world fought or negotiated, as usual, for the usual objects of ambition or national interest; but the principles of public conduct were, from this time, settled into comparative uniformity.

From the peace of Utrecht, therefore, down to the famous period of the Armed Neutrality, nothing very material occurs, as to the principle before us, in the views and conduct of the maritime powers. It went on, as we saw in the last century, often stipulated for by commercial conventions, but oftener passed over in the treaties of the times. That it existed in the majority of those that were formed, is not more true, during this period, than the last; that it was once, for the first time, set up as a natural right, distinct from all treaty, by the Prussian King, in 1752, is, as we have seen, true; but that it was instantly beat down by the cogency of the reply, so as, at least, to produce an alteration of conduct, if not of sentiment; and that the authority of three of the most learned of their time was directly against it, has also been set forth at large. Under all the insults, injuries, and abuses, which the right to invade enemies' property on board neutral vessels had too often generated, no one, until the armed pretensions of 1780, again thought of setting up the principle, either as a positive remedy, or an abstract right, emanating from the indissolubleness of natural justice.

To return, however, to the point immediately before us. It remains still to be seen, whether the conventions of the times, up to this epoch, continued, as asserted by Schlegel, to form a majority equal to the unheard of pretension,—to legislate for other independent Sovereignties. Into that point we are not now called upon to examine, but are merely enquiring as to the fact concerning the number in which the treaties existed.

The principle being, as we have seen, allowed by treaty, between France and England, France and Spain, and France, Spain, England, and Russia, with Holland; all treaties confirming these, though not new in these points, are claimed to be taken by our opponents as enhancing the number in their favour. But, though much may be observed on the fallacy of that mode of computation, as the medium of truth on the subject, I have not been unwilling to obey the path they have pointed out, for the sake of ascertaining how far the assertion, as to *numbers*, is really well founded.

The treaties, then, of the seventeenth century, as to commerce, having been for the most part confirmed in the greater treaties of the eighteenth, I am willing to take such treaties as those of Madrid and Seville, of Vienna, Aix la Chapelle, and of Paris, as augmenting the number of those which allow the principle amongst all the contracting parties which had allowed it before. Upon this mode of calculation, the treaty of Seville, between France, Spain, and England, confirms the maxim between the two first, and the last and the first, in confirming the treaty of Utrecht.

It is also confirmed by the treaty of Aix la Chapelle, between France and England, France and Spain, Holland and France, and Holland and Spain; so also, by the treaty of Paris, in 1763, between England and France, and France and Spain.

I find it also allowed in the treaty between England and Tripoli, in 1751; England and Tunis in 1752; and again with both those powers in 1762. There are also, as it is said, others between Denmark and Spain in 1742; Denmark and Naples in 1748; Denmark and Genoa in 1756; and Naples and the Netherlands in 1752; and these for the present I am willing to take for granted.* On the whole, then, this

* This enumeration was made in a cause in the Court of Prize here, but I have not yet had an opportunity of seeing them. I a little doubt their accuracy

this enumeration of conventions from 1715 to 1780, which stipulate for the observance of the principle, reckoning each contract between any two parties at a general treaty as a separate treaty of itself, amounts to twenty.

On the other hand, it is no where mentioned in the treaties between the Emperor and the Porte in 1718;* between Sweden and Russia in 1721;† or Sweden and the Porte in 1739;‡ nor is it mentioned by Sweden and England in 1720;§ nor again in 1766.‖ Spain and England, by confirming their ancient treaties at Madrid, 1721,** left the matter where it was, which, as we contend, was not to allow the maxim: so they did at Seville in 1727;†† at Aix la Chapelle in 1748, where Sardinia and Genoa also left it untouched between England and themselves;‡‡ and at Madrid, again, in 1750;§§ and at Paris in 1763.‖‖ The accession of Portugal, also, to the latter treaty, by confirming all former conventions, left the subject without any alteration between herself and Great Britain. Russia and England passed by the maxim in 1734, 1742, and 1755;§*§ and in 1766 the most extended liberty that was granted was to be allowed to trade with enemies, 'observing, at the same time, the prin-'ciples and maxims of the *Law of Nations* generally acknowledged.' Of course, the principle before us was not in contemplation.

Sweden and Denmark, in 1720, allowed what all commercial treaties allow at the close of a war—the liberty of

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accuracy, as there is also enumerated with them the treaty of Vienna, 1725, between Spain and the Emperor; which, unless proof of the converse of the maxim is proof of the admission of the maxim itself, does certainly not go to the length of the assertion.

* Corps Diplom. 16. 33. † Id. 36.
‡ Rousset Recueil Hist. &c. 18. 5. § Corps Diplom. p. 2. 18.
‖ 1 Chalmers, 60. ** Corps Diplom. 8. 2. 33. †† Id. 258.
‡‡ 3 Jenkinson, 374. §§ Pap. Off. c. 61. ‖‖ 3 Jenk. 177.
§*§ Gostling's Marine Treaties.

trading

trading with each other, as in times of peace; but no mention is made at all of the maxim;* neither is it farther noticed between Sweden and Russia in 1721.† In the famous treaty, cited by Hubner amongst his examples, to prove the *conventional law* made between the Emperor and Spain in 1725, it is stipulated, as in the Spanish treaties with England, that the converse of the maxim shall exist; but no mention is made of the maxim itself.‡ Notice of either one or the other rule is wholly passed over by the treaty between Naples and the Porte in 1740, §, and in the preliminary treaty between France and Sweden in 1741. ‖ With respect to the Porte and the Barbary States, the maxim is seldom heard of in their treaties in general. We saw, indeed, that two treaties between England and Tripoli, in 1751 and 1762, and two between England and Tunis, of the same years, allowed it to the full; but in six treaties with Morocco, and five with Algiers, from 1698 to 1783, all is passed over in silence;†† and to come back again to Europe, the old law of France disallowing any innovation, is asserted in the most positive terms, by the treaty between that country and Hamburgh in 1769.

The language of this last is somewhat remarkable. In mentioning the rejection both of the principle and its converse, it speaks not of it as a rule to which what is about to be stipulated is an exception; but lays it down rather as if the contrary were the acknowledged general principle. 'In order,' says the fourteenth article, 'that the inhabitants 'of Hamburgh may know in what consists the freedom of 'their commerce and navigation in time of war; and that 'they may have a perfect understanding of the risks they

* Corps Diplom. 16. 30. † Id. 16. 36. ‡ Id. 16. 115.
§ Rec. de Rouss. 18. 7. ‖ Id. 18, 19.
†† Gosting's Treat. 304 et enfra.

'run

'run in engaging in an illicit trade, it is decided that con-
'fiscation follows:

'I. Where goods and merchandise belonging to the said
'inhabitants are found on board ships of the enemy.

'II. Where contraband goods, hereafter to be specified,
'are found on board the ships of the said city, destined for an
'enemy's country.'

The sixteenth Article then makes the specification; and the seventeenth adds, 'that it shall also comprehend '*all the effects, goods, and merchandise generally, whatever* '*they may be, belonging to the enemies of the King.*' The ship itself, however, is not made subject to confiscation.*

And thus, according to this enumeration, not less than thirty-four treaties passed between the various Maritime States, from the year 1715 to 1780, which take no notice of the principle before us; and these, in addition to thirty-one, which were formed between 1715 and 1642, the epoch whence Schlegel, on the authority of Busch, commences the series of contrary conventions, make in all no less than sixty-five. Seven are to be added, which, as we see, were actually adverse. And the maxim is, therefore, either positively denied, or totally unnoticed by as many as seventy-two. Granting, then, what is not improbable (calculating upon the ground which has here been pursued) that there are thirty-five treaties favourable to the principle, what is to become of the proof that it forms so considerable a majority as, of necessity, to make the rule for all countries not bound? The power of thus binding them, our principles have wholly denied, into whatever proportion, on the one side or the other, the treaties may be divided. But it seems not a little extraordinary, that so new a paradox should be started as law, with such fragile foundations even as to the fact!

* Marten's Treat. 254.

Be

Be this, however, as it may, and leaving the evidence of treaties to prove what it can, the time was now actually fast approaching when the claim was really to be set up as a pretension founded in the Law of Nature; and therefore belonging to what is called the primitive Law of Nations. In the last war alluded to (1756), the French had made such havoc among Danish interlopers as to call forth the attention of the Danish Government in the most serious manner; and there being, without doubt, many of those instances of illegal violence which, in the wild uproar of general war, are too often inseparable from the exertion of legal rights; they sent over one of their learned civilians to Paris, to vindicate their claims, and, if possible, to settle a different law. This person was Hubner, who wrote the treatise, which has so much engaged our disquisitions, under these impressions; and who may, therefore, be considered as an advocate pleading under particular instructions, and, as far as that can influence an advocate, under the impulses of particular feelings. I do not mention this as a thing of much, if of any weight; but I cannot help observing, if there can be any difference, that it must be all on the side of the dispassionate and unbiassed treatises of those learned and virtuous personages of the last and the preceding ages, who wrote for the improvement of the world, without reference to any particular object, to any country, or to any king. Such men did not compose their admirable works for the accomplishment of a mission, in which success was probably to be the foundation of their fortune; they engaged in their noble occupation for the sake of truth, considered by itself, or, at most, for the acquisition of honourable fame. About such men, therefore, there is thrown a sanctity and veneration, which, with equal learning and knowledge, others cannot acquire. The difference seems to be no less than that of the advocate and the independent judge; and, supposing them to be equal in all other points, these observations must ever attend the comparison between

between Hubner, and Vattel; Heineccius, Bynkershoek, Puffendorf, and Grotius!

Be it, however, as it may, it must be acknowledged, that, from this time, an alteration in the claims *of right*, under the Neutral Code, came to be attempted by many nations, with an ardour and vehemence not before known. What Schlegel says, indeed, is not true—that, from the time of Hubner's Treatise, men versed in the Law of Nations almost unanimously confessed the justness of the axiom, that Free Ships made Free Goods;* because a thing which had been exercised, and had rested for perhaps six hundred years in natural right, could not so instantaneously be discovered to have ceased to exist, or to have lost its foundations: but the fact is true, that endeavours began to be made to tie it up by treaty, and to enlarge the power of Neutrals at the expence of Belligerents. Till the American war, there was little room for trial; but, even after that eventful period, it is remarkable, that no attempt was made on the part of the Northern Sovereigns to obtain from Great Britain, or from France, this much wished for privilege, by treaty or convention. On the contrary, a number of treaties were allowed to remain in force, in which no mention is made of the claim; and, not only this, but many articles, under those treaties, are, in express terms, declared to be contraband, which the principles of the Armed Neutrality were framed to set free. Nor here can we abstain from observing upon the conduct of Denmark, under the guidance of that very Minister, whose premature loss to Europe and to Denmark is so much the object of Schlegel's lamentations.† If, to sign a convention, which professed to have for its object the solemn set-

* Schlegel, 10.

† Schlegel, xvi. 'On se rappellé par quels argumens irrésistibles notre 'grand ministre M. de Bernstorff, trop tot enlevé au Danemarc et à 'l'Europe entiére, &c. &c.

tlement

tlement of things long in difference, four days before he signed another, which totally annihilated the first, unsettled all the bonds of connection, and opened a cause for perpetual discontent, if not for perpetual war; if this was the part of a truly great minister, sincerity, at least, has no place in such a character. In 1670, a solemn treaty of commerce was concluded between England and Denmark, the third article of which contained the definition of contraband; but in which, however, the words, 'other necessaries for 'the use of war,' were thought too indefinite. To remedy this, a convention was made to put the matter out of doubt, by an article to be substituted in the place of the other; by which contraband was declared to include the very subjects so often disputed,—ship-timber, tar, pitch, rosin, sheet-copper, hemp, sails, and cordage.* This was signed on the 4th July, 1780. On the 8th was signed that Declaration of the Armed Neutrality, which had long been concerting between its original members; and in which the King of Denmark declares, that he understands nothing under contraband, except the articles specified in the third article of the treaty of 1670.†

An inconsistency so manifest, an insincerity so glaring, a conduct so open to the charge of bad faith, as is thus exhibited in this simple relation, requires no sort of comment. But, for the sake of Denmark, and of human nature, of that fair and honest wish, that the characters even of hostile Ministers themselves should be freed from all impure spots, let M. Schlegel justify, if he can, this conduct of his country, and her Minister. England will rejoice in that justification; and, if she can, will be the first to acknowledge it.

Respect for a Power, whose conduct has long been respectable in the history of Europe, and which has long ex-

* 2 Marten's Treat. 102. † Id. 362.

isted

isted in close amity with this country, ought to check the impulses of just resentment; but, we cannot help observing, that, when she stooped to such Machiavelian attempts to amuse, real mischief could not be far off. Accordingly, many days did not pass, before the world was surprised with those bold declarations of the Armed Neutrality, which have been noticed in the beginning of this work,* and which claimed no less than to dictate what should be universal custom, because certain states chose to bind themselves to it by treaty; to set aside rights of six hundred years enjoyment, and establish a Law of Nature by force of Arms.

Astonishing as these pretensions were, the manner in which they were received by some of the Belligerents was not less so. France and Spain, with low and little policy, immediately approved them. The former did not hesitate to profess that the war she had undertaken had no other object than the liberty of the seas; that she was supporting the rights of neutrality at the price of her people's blood; and that the claims of the Armed Neutrality were no other than what were already allowed by the rules of her marine.† How this was reconcileable with truth, the history of the French law, as detailed in the foregoing pages, is best able to testify.

The Spanish answer to the Russian Declaration was not quite so unqualified, but still full of approbation.

It notices, however, the practice which Neutrals had fallen into of providing themselves with *double papers, and other artifices;* from which detentions, and other disagreeable consequences, had arisen. At the same time, on the whole, it perfectly acceded to the Armed Neutrality.‡ And thus, two of the greatest Maritime States of the world, as well as

* Introduc. xii. † Ann. Reg. 1780. 350. ‡ Id. Ib.

the

the most antient monarchies; one of them in particular, renowned for honour and a height of spirit which ought to have despised the meanness of acquiring immediate advantage at the expence of sacrificing the general interest in time to come; stooped to the narrow policy of weakening a great principle of the Law of Nature itself, in order to acquire a temporary advantage in a war already unequal.

Even if they were sincere, their mode of action, as well as their language, spoke little of true and simple dignity. In that case, they ought themselves to have demonstrated their sincerity by the clearness of their previous conduct. As it was, they allowed the youngest State of Europe, under the direction of an energetic woman, to get the start of them in asserting the privileges, which they, in their actions at least, had not attempted to assert. If they were not sincere, no observation need be made; but, in the one case or the other, I know nothing so undignified or so degrading, as the answers of the Courts of Versailles and Madrid to the Russian Declaration.

Solitary, and abandoned by the whole world; struggling with a fatal schism amongst her own children; opposed, with diminished resources, to all the greatest Maritime Powers of Europe, to the Continent of America, and almost to the Continent of Asia; without a single ally, and before her ancient vigour had shone out under the direction of her favourite admiral, to the dismay of her opponents; nothing could be more firm, or consequently, in such a situation, more honourable, than the conduct of Great Britain. She did not disclaim the rule of action upon which she had ever proceeded; she did not approve of the natural justice of the new theory asserted; she did not 'applaud the principles 'and views of the Empress, as partaking of the same sen-'timents;'* but she firmly, though prudently, answered,

* See the French Answer, ubi sup.

that

that she should act according to the clear principles of the acknowledged Law of Nations, where no treaty had modified that law; and that she would abide by her treaties where they actually subsisted. In particular, with respect to Denmark, she reminded her of the treaty then existing, which nothing could overcome but *mutual* agreement; and which, she said, should still, therefore, be the sole basis of her conduct.

With regard to Sweden, she also relied on the treaty which had always regulated their mutual actions; one article of which had expressly marked out, that the goods of enemies should be seized on board the ships of friends. This engagement, she asserted, could not be violated without breaking the friendship which had so long subsisted between the countries, and formed ties from which neither could be set free, except by the consent of both. 'The 'King, therefore,' says the answer, 'will adhere to these 'engagements as an inviolable and sacred law, and he will 'maintain it as such.' *

The observations which might be made on the Armed Neutrality open a vast field; but much has been forestalled by the preceding matter of this treatise. We cannot, however, help here adverting to a strange and glaring inconsistency which appears on the face of it. One great object of the Convention was to establish a difference between unprotected merchant ships, acting for themselves, and those protected by convoy, acting under command. The reason for this, as it was said, was founded in the minute and strict enquiry which would be made in the latter case, *before the goods were laden*; in consequence of which, and of which

* Marten's Treat. iv. 368. And see a Collection of Public Acts and Papers relating to the Armed Neutrality; printed for Hatchard: p. 130 to 135.

alone

alone, very strict passports, on oath and rigorous examination, were to be taken out: so that the faith of the State was pledged to take care that no illicit commerce was attempted by those who put themselves under the *national* flag. The soundness and cogency of this sort of reasoning we shall examine in its proper place; for the present, we will take it for granted, that the respective governments did actually intend, and had in reality the means to carry this specious design into execution. Now, in turning to the fifth article of the Armed Convention, * we find that, should it happen that the merchant vessels of one of the powers should be in a latitude where no ships of war of the same nation were stationed, and where they could not have recourse to their own convoys; then the commander of the ships of war of the other Power, if he be requested to do so, ought, in good faith, and sincerely, to afford them the assistance of which they may be in need; and in such a case, the ships of war and frigates of the one Power shall grant protection and assistance to the merchant vessels of the other; provided that these shall not have carried on any illicit trade, or any trade contrary to the principles of neutrality.

Upon this article, the question immediately arises, how it is possible for a foreign, though an allied ship of war, or even one bearing the national flag, to be able to answer for the particulars of the cargo, or of the previous voyage and transactions, of a private merchant ship, which happens to meet him by chance in a latitude where she can find no cruisers of her own nation? What becomes of the solemn enquiry to be made on shore as to the nature of the cargo, in order to insure its innocence? As it is the *national* flag which demands, as the price of its protection, that the particulars should be made out, in order that the *national* faith

* Collect. of Pub. Acts, &c. 113; Marten's Treat. 4.

may

may be safely pledged, which is the spring and ground-work of the whole right asserted; how is it that Russia is so prompt to answer for a solitary Swede, or Sweden for a Russian, or Denmark for either a Swede or a Russian, coming from they know not what latitudes, and provided with they know not what muniments, but on whose simple word they are to strive, in even bloody contest, rather than suffer them to be examined?

It cannot be on the faith of papers, the agreement between which and the cargo they have had no opportunity of examining: it cannot be on the faith of the master's word; for neither papers nor word are more than what are offered to the searching Belligerent in cases without convoy, in which search is allowed by the confederated Powers themselves. What magic is it which throws this sort of sacredness about a merchant vessel the moment it meets the flag of a ship of war, whether of its own or of another country, those, and those only, can determine who framed the stipulations of the Armed Neutrality, as they said, on principles of natural justice.

These sort of observations are perpetually arising, and must perpetually arise from the very nature of the subject; so true it is, that when once sound principle is departed from, it is in vain to act, or to plan any scheme of action which shall regularly be found to square with it. Had the Armed Alliance, profiting by the opportunity of the times, by the supposed weakness of Great Britain, and the flagrant meanness of her enemies, come boldly forth in the teeth of justice, instead of assuming its garb; had it thrown off its treaties by force, or made war to break them, and for that purpose alone, till distress should have extorted an acquiescence under new stipulations; the way would have been clear, though made by violence; and, at least, would never have been clogged with insuperable inconsistencies, always arising from the pretence, that what they did was founded upon natural

natural right. In this respect they engaged in a gigantic contest far beyond their strength, because beyond the power of humanity, to change the decrees of reason, or to turn truth into falsehood.

And this is the cause of the difficulties under which the reasoning of the principle, and the conduct of those who profess it, must ever labour. If really this new rule is that drawn from Nature, or that which binds from the majority of the conventions upon it, who is to say, when it began, how long it is to last, when it is to cease? Who is to act upon it? What Court is to be governed by it? When are individuals and Courts to bend to a new law? It happens peculiarly, that, the very year before France, and in the very year in which Spain acceded to the principles of the Confederacy, as founded in justice, emanating from natural liberty, or derived from universal convention; each of them had formed treaties, or made ordinances, directly subversive of the whole principle. In September 1779, seven months before the French answer to the Russian Declaration, France made a treaty with Mecklenburg, framed exactly on the same rule with that with Hamburgh a few years before;* in which contraband was made to include all enemy's property, of whatsoever nature, on board the Mecklenburg ships.† Far beyond this went Spain, in her ordinances with regard to Neutrals, in the year 1780 itself, and only one month before her accession to the principles of the alliance. In those ordinances she seemed to care little for the duty prescribed to her by her treaties, provided it was necessary to oppose the operations of Great Britain where there was no treaty. In those ordinances she declared, that, with respect to British merchandise on board neutral vessels, she must follow the rule

* See page 151. † 2 Marten's Treat. 39.

of Great Britain herself with regard to cargoes of the same nature; 'in order,' says the ordinance, 'by this re-'ciprocity (a most mistaken one!) to avoid the enormous 'inequality, the prejudice, and even ruin, which other-'wise might be brought upon the Spanish commerce!'

That Spain should fall into this conduct, and even found it upon a supposed rule of reciprocity, is not surprising; but it baffles all attempts to reconcile it with consistency, that this should be done by one who thought the principles of the Armed Neutrality were the true neutral principles. A very little enquiry into the meaning of things must shew us, that this conduct was reciprocal, even in their own mistaken sense of that word, only with regard to Great Britain; while the innocent Neutral, with whom probably she was bound by treaty to a different conduct, was, without scruple, made the sacrifice. When, for example, she was bound by treaty with Sweden to allow 'Free Ships 'Free Goods,' between whom and Great Britain the contrary stipulation existed, could there be any reciprocity in breaking that treaty with Sweden, because Great Britain acted upon the provisions of her's? In such case, even supposing there was the same sort of treaty between Great Britain and Sweden, it was neither more nor less than to say; because my enemy has broken his duty, and injured and pillaged you, I also must injure and pillage you, or my commerce will be ruined. A child would detect the fallacy of the argument!

The ordinance goes on, however, to state heavy complaints against neutral interference in the war;—that interference which Spain was, in a month, to sanction with her perfect approbation, as arising from natural right. It complained, that they eluded the blockade of Gibraltar; that they had frequently double sets of papers, and other disguises, in order to screen *the real owners of the cargoes*. 'Though these facts,' says the ordinance, 'are notorious, 'and

'and have been proved by formal process, yet these per-
'verse men, eager for gain, have disturbed all Europe with
'their clamours; asserting falsely, that orders had been
'issued to detain and seize all neutral vessels which passed
'the Straits; when, in fact, the orders were expressly,
'only to detain such ships as were suspected, either from
'the course they steered, or the papers they produced, *and*
'*such as carried enemy's goods or provisions!*' In consequence of these reasons, the ninth article goes on to enact, that when enemy's property shall be found on board Neutrals in future, it shall be seized and confiscated, paying the freight.* One month afterwards, she approved the principles of the Armed Neutrality.

Where views of policy, however, are so changeable, and principles of law so little fixed, perseverance in any given line of conduct is not to be expected. Accordingly, within these few years, Spain, on entering into the war with France in 1793, came round again to the old rule, when she stipulated, by a convention with Great Britain, that their Majesties should unite all their efforts on this occasion of common concern to every civilized State, to prevent other Powers, *not implicated in the war*, from giving, in consequence of their neutrality, any protection whatever, directly or indirectly, to the commerce or property of the French, on the sea, or in the ports of France.† Exactly the same sort of convention was entered into by Russia herself with Great Britain, in the same year;‡ and the instructions given by the Empress to the commander of her fleet (that very Empress who dictated, guided, and sup-

* See the letter of the Count Florida Blanca to the Marquis Gonzalles de Castejon, pour servir de Réglement concernant la Navigation des Neutres, 13 March, 1780.—*Marten's Treat.* 4. 268, *and the ninth Article.*
† Collect. of Pub. Acts, &c. 146. ‡ Id. 142.

 ported

ported the Armed Neutrality of 1780) demonstrate, in the most forcible manner, the change of her sentiments.—Those instructions command him 'To prevent all neutral 'vessels from carrying stores or provisions to France.' They state that 'Denmark, with its accustomed weakness, 'and preferring even an ideal gain to the sound consider-'ations of policy, had refused to consent to her just de-'mands; therefore all ships are to be stopped and searched, 'even those under convoy; which, if resisted, the honour 'of the Russian flag is to be maintained, and force repelled 'by force; without pursuing, in case of flight, the vessels 'composing the convoy; putting only in execution what is 'prescribed, *to prevent any navigation to the enemy's ports.*' * Such was the tone of Russia, becoming belligerent, in 1793, to her very confederates in the Armed Neutrality: nor had Sweden been backward in renouncing the principles of that celebrated alliance.

A very important circumstance is here to be remembered; that, although that alliance professed to delineate the principles of universal justice, its stipulations were only to continue during the war. It held out, indeed, that measures were to be taken as a guide to new engagements; and the King of Sweden, in particular, was anxious to propose a congress, in which the rights, both of Belligerents and Neutrals on this subject, should be for ever settled: but this was not done. After the peace, therefore, of 1783, the contracting parties were left alone to review their opinions: if well founded, to bring them again into action; or, if ill founded, to renounce them altogether, when next called upon to assert or reject them, according to the exigencies in which they should be placed. Sweden at least, it is to be supposed, decided that her conduct had been wrong; for Sweden, in the

* Collect. of Public Acts, &c. 142.

next

next war she waged, most absolutely renounced the principle as a Belligerent.* It would be too gross an affront to her justice, to suppose that she has two lines of conduct; one as neutral, the other as belligerent; we will, therefore, rather suppose that she saw the errors into which the aspiring genius of Russia, or her own impulses, heightened, perhaps, by the incidental injuries inseparable from war, had betrayed her; and that she thought, as her treaties bade her think, that the principle before us could only be matter of convention.

We have already noticed the strange and inconsistent, not to say unjust conduct of Denmark on closing with the Armed Neutrality. Denmark at least, therefore, in this instance, can furnish no example of a State versed in the true laws and principles of that natural justice which she armed herself to impose upon the world as the universal and invincible rule of its conduct. Very few years after having so armed herself, and still fewer before she acceded to the present alliance, both Denmark and Sweden, (most remarkably, the only two powers which Schlegel recollects to have formed treaties *renouncing* the principle) renewed that renunciation, by declaring, in their convention of 1794, that they claimed no advantages but what were clearly founded in all their respective treaties with the different Powers at war.† Now, 'Free ships Free goods,' was at least not one of these advantages; since each of them had tied herself down with Great Britain,—I will not say to renounce, but not to demand it,—above one hundred years before, by the treaties we have mentioned in the last century; which

* Schleg. 14, 15. 'Dans la guerre que le Roi Gustave III. entreprit contre la Russie, il se laissa entrainer, par une politique de circonstance, à oublier, les mêmes principes dont il venoit si récemment de se montrer le zelé et courageux défenseur.'

† Collection of Acts and Papers, &c. p. 160.

treaties

treaties were never abrogated. Denmark also, in particular, in her instructions to her merchants, February 22, 1793, confirmed her treaty, and again renounced the claim, when she stated that the treaty of 1670 with England, stipulating, that, amongst a ship's papers there should be a certificate to prove *that the cargo belongs to a Neutral Power*; she had, therefore ordered her magistrates to deliver such necessary certificates.*

About this time also Prussia, another of the Powers which had acceded to the Armed Neutrality, joined as a Belligerent in those general stipulations with Great Britain, 'to 'prevent other Powers, not implicated in the war, from 'giving protection directly, or indirectly, to the commerce 'of the French on the sea, or in the ports of France.' †

A great variety of Powers, composing nearly all Maritime Europe, had acceded to the principles of the Armed Neutrality. America, the cause and object of the eventful war which gave it birth, sanctioned of course what was so much to her advantage. She was bound by all her great views of trade; by all on which her existence depended, by every tie of gratitude to her friends, and by every feeling of resentment against Great Britain, to broach, uphold, and disseminate the doctrine far and wide, as arising immediately from the rights of Nature, or at least founded in such universal convention, as to acquire every where the force of law. Of the great trading nations, however, America is almost the only one that has shewn consistency of principle. The firmness and thorough understanding of the Laws of Nations, which, during this war, she has displayed, must for ever rank her high in the scale of enlightened communities.

Her treaty with France, 1778, was formed on the stipulations of 1780, by which she was ever ready to

* Collection of Acts and Papers, p. 137, the sixth article. † Id. 146.

abide

abide; her treaty with England, 1794, gave up the whole of those stipulations. In the seventeenth article, she agreed that enemies' property on board her vessels should be confiscated, and that on just suspicion the vessels themselves might be detained, and carried into the nearest port, for the examination and adjudication of the property. She had a right to make both these treaties: and, under a case of some difficulty, by both she abided.

In 1798, the statesmen of France, amongst other crudities, set up the strange assertion, that, as the Americans were bound to treat them as the most favoured nation, they ought not to allow French property to be seized by British cruisers on board American ships, while they prevented the seizure of British property in the same situation by the French; and they threatened war for not complying with this representation.

The American answers to these sophistries are models of dignified and convincing reasoning. Whilst they rejected all suspicion of being influenced by fear, from the orders which they gave for warlike preparations, their ministers attacked the French arguments with irresistible power. 'Before the treaty with Great Britain,' said one of their notes to the French Government, 'the treaty with France existed. 'It follows, then, that the rights of England, being neither 'diminished nor increased by compact, remained precisely 'in their natural state, which is to seize enemies' property 'wherever found: and this is the received and allowed prac-'tice of all nations, where no treaty has intervened.' A new *Law of Nations*, it is pretended, was introduced by the Armed Neutrality; but who were the parties, and what was their object? 'The compact was in its own 'nature confined, with respect to object and duration. *It did* '*not purport to change, nor could it change permanently and* '*universally the rights of nations, not becoming parties to it.* 'The desire of establishing universally the principle, that 'neutral

'neutral bottoms shall make neutral goods, is perhaps felt 'by no nation on earth more strongly than by the United 'States. Perhaps no nation is more deeply interested in its 'establishment; but the wish to establish a principle is es- 'sentially different from a determination that it is already 'established. The interests of the United States could not 'fail to produce the wish; their duty forbids them to indulge 'it, when decided on a mere right.'*

'The complaints of the French,' said another note of the American Minister to his President,† 'had reference, amongst other things, to the abandonment, by the Americans, of their neutral rights, *in not maintaining the pretended principles of the modern Law of Nations*, that Free Ships make Free Goods; *and that timber and naval stores are not contraband of war.* The necessity, however, for the strong and express stipulations of the Armed Neutrality itself, by all the various Powers which joined it, shewed (as the note went on to state) that those maxims were not in themselves law, but merely the stipulations of compact; that, by the real law, Belligerents had a right to seize the property of enemies on board the ships of friends; that treaties alone could oblige them to renounce it; and that America, therefore, could not be accused of partiality to Great Britain, *because she did not take arms to compel her to renounce it.*'‡

As far, then, as we can collect from these reasons and principles, America will, at least, not oppose the object of this treatise. By the firmness she displayed she overcame the threats of France; and by the accuracy of her reasoning she triumphed in the argument. Unhappily, however, all did

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* Collection of Acts, &c. 198, et infra.

† Mr. Pinkney to General Washington.

‡ Debrett's State Papers, 5. 281, 286. The whole letter, which is an answer to Adet, the French Minister's complaints, deserves the best attention. It is an admirably reasoned piece of diplomatic representation.

not

not shew equal accuracy of understanding, or equal regard to the obligations of treaty.

We have seen the direct renunciation of Russia, in 1793, of the principle which governed her in 1780. In the instructions which developed this renunciation, she, indeed, made a difference between common wars and that she was about to wage; but, as Denmark had resolved upon neutrality, no part of the reasoning could be binding upon her. 'As these measures,' said the instructions, 'are taken against arrant villains, who have overturned all duties towards God, the Laws, and the Government; and have even taken away the life of their own Sovereign; the means of punishing these villains, and of making them re-enter the way of truth, after having been enveigled into crimes, ought, in justice, to be employed *in such a manner as to accelerate and ensure success in so salutary an affair.*'*

We have no hesitation in saying, that these instructions were a gross and flagrant invasion, on the part of Russia, of the independent Sovereignty of Denmark. Had France been even more blood-stained than she is with cruelty, perjury, and crime of every sort; although it might be fair ground for any other nation to interfere, if she chose, by way of punishing offences against the Laws of Nature; yet no power that ever was assumed under the Law of Nations could give a right to that avenging nation to call upon another for assistance against its will. This pretence, therefore, was well answered by the Minister of Denmark, when once it had resolved to acknowledge the Nation of France.

But what, after so glaring a departure from its principles, are we to think of the consistency of the Russian Court, when, finding it necessary to change its public measures, it

* Collect. of Acts, &c. 149.

recurs

recurs back again to its Declarations of 1780, breaks down the whole principle that governed its late conduct, and once more becomes the champion of Neutral usurpation? 'Europe had applauded,' says the Declaration of the 16th August, 'the measures which were taken by the greater 'part of the maritime Powers to render sacred the prin-'ciples of a wise and impartial neutrality, when, in 1780, 'a maritime war between two great Powers made it in-'cumbent on the rest to provide for the safety of the com-'merce and navigation of their subjects. Every act found-'ed upon justice must meet with universal approbation; 'and this was, in effect, merely re-establishing the prin-'ciples of the Rights of Nations.' *

A departure so strong and so pointed from the last governing principles of the conduct both of Russia and Sweden could only prepare the way for the late most eventful measure, big with fate to the nations concerned, and putting a last hand to the chain of their inconsistencies. The convention of the 16th of December renews and gives additional vigour to the Armed Neutrality of 1780, and engrafts upon it an entire new and most momentous article, which states:

'That the declaration of the officers who shall com-'mand the ship of war or ships of war of the King or 'Emperor, which shall be convoying one or more merchant 'ships, that the convoy has no contraband goods on board, 'shall be sufficient; and that no search of his ship, or the 'other ships of the convoy, shall be permitted. And, the 'better to insure respect to those principles, and the stipu-'lations founded upon them, which their disinterested wishes 'to preserve the imprescriptible rights of neutral nations 'have suggested, the high contracting parties, to prove

* Collect. of Acts, &c. 243.

their

'their sincerity and justice, will give the strictest orders 'to their captains, as well of their ships of war as of their 'merchant ships, to load no part of their ships, or secretly 'to have on board any articles, which, by virtue of the 'present convention, may be considered as contraband: 'and, for the more completely carrying into execution this 'command, they will respectively take care to give direc- 'tions to their Courts of Admiralty to publish it, when- 'ever they shall think it necessary; and to this end, the 'regulation which shall contain this prohibition, under the 'several penalties, shall be printed at the end of the present 'Act, that no man may plead ignorance.'

To the old stipulations renewed by this convention, together with this important article engrafted upon them, Denmark has acceded—Denmark, who, to use the language of her great ally, prefers, with her accustomed weakness, an ideal gain to the sound considerations of policy.* Prussia has also given it all its support, prepares its forces, and seems hot for the contest. Our country does not shrink from it, engaged as she is in the most arduous of her wars; and Europe awaits the event in fearful expectation.

And thus we have conducted this important, this interesting, this entangled, but not difficult, subject through all the mazes of adverse arguments, adverse treaties, and adverse conduct. That no light might be wanting for its elucidation, we have *endeavoured*, at least, to deduce its history from its first existence, through all the changes that were attempted, resisted, or allowed upon it in all ages, by whatever countries and whatever men. The deduction has been long, but, I hope, not unprofitable. A

* See the Instructions to the Russian Admiral Tchitchagoff, Collect. of Acts, 149.

point

point of such mighty consequences, at this moment, in the affairs of Europe and of the world, can never be too much examined, sifted, or tried.

Whether, after this examination, any doubt can remain upon the foundations of the neutral pretension, under whatever shape the argument may be framed ; whether it can still be imagined, either from the force of general reasoning, the strength of authority, the uniformity of treaties from times of old, or the consistent and recent conduct of Neutrals themselves, that the right which we resist is the natural right of mankind ; I myself am unable to judge. The enquiries of my own mind have produced satisfaction, that the natural right is on the side of the Belligerent ; and that the neutral claim, where allowed, is a matter of the purest convention. As to the position, that, where the majority of treaties have fixed upon any given point between the powers that contract, it shall form the law for those which have not contracted, it is really too absurd to demand one moment's attention. It can only be made use of by jugglers and robbers of the day, to carry a point of temporary rapacity ; or by visionary enthusiasts, mad in the pursuit of a vain philosophy. I give them credit for their motives and their sincerity ; and I mean them no disrespect when I say, that, amongst the honest men, it can only be found in such theories as leap from the fancy of Hubner or the dreams of Schlegel !

ADVERTISEMENT.

Indispensable professional avocations have obliged the Author to leave the general subject of his Treatise here —only, however, for a short time.

The first Proposition, forming a complete subject in itself, he has been induced to publish it apart. The other Propositions will follow all together, and the whole will form a volume.

APPENDIX.

No. I.

Declaration respecting Maritime Law, signed by the Plenipotentiaries of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, assembled in Conference at Paris, April 16, 1856.

The Plenipotentiaries who signed the Treaty of Paris of the 30th of March, 1856, assembled in conference,—

Considering that maritime law, in time of war, has long been the subject of deplorable disputes;

That the uncertainty of the law and of the duties in such matter gives rise to differences of opinion between Neutrals and Belligerents which may occasion serious difficulties and even conflicts;

That it is consequently advantageous to establish a uniform doctrine * on so important a point;

That the Plenipotentiaries assembled in Congress at Paris cannot better respond to the intentions by which their Governments are animated than by seeking to introduce into international relations fixed principles in this respect;

The above-mentioned Plenipotentiaries, being duly authorized, resolved to concert among themselves as to the means of attaining this object; and, having come to an agreement, have adopted the following solemn Declaration:—

1. Privateering is and remains abolished.

2. The neutral flag covers enemies' goods, with the exception of contraband of war;

3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag;

4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The Governments of the undersigned Plenipotentiaries

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* The United States and other Powers not having acceded to this Declaration, this argument in its favour falls to the ground.

engage to bring the present Declaration to the knowledge of the States which have not taken part in the Congress of Paris, and to invite them to accede to it.

Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned Plenipotentiaries doubt not that the efforts of their Governments to obtain the general adoption thereof will be crowned with full success.

The present Declaration is not, and shall not be binding, except between those Powers who have acceded, or shall accede to it.

Done at Paris the 16th day of April, 1856.

Signed BUOL-SCHAWENSTEIN,
HUBNER,
WALEWSKI,
BOURQUENEY,
CLARENDON,
COWLEY,
MANTEUFFEL,
HATZFELDT,
ORLOFF,
BRUNOW,
CAVOUR,
DE VILLAMARINA,
AALI,
MEHEMMED DJEMIL.

No. II.

THE CRIMEAN WAR, THE DECLARATION OF PARIS, AND THE BRUSSELS CONGRESS.

MR. URQUHART'S PETITION TO PARLIAMENT TO ANNUL THE DECLARATION OF PARIS, JULY 3RD, 1874.

To the Honourable the Commons of Great Britain and Ireland in Parliament Assembled.

The Petition of the Undersigned sheweth,—

That your Petitioner, at the moment of the despatch of British troops to the Ottoman Empire, under colour of a pretended Declaration of War against the Emperor of RUSSIA, did address to the Honourable House of Commons a Petition representing that such forces were not required to support the SULTAN, and that their presence on the field of war and the use that would then be made of them would only have for effect to aid that ambition of the CZAR against which it was proposed to protect the SULTAN and the world.

That the events of the twenty years which have elapsed have confirmed the allegations of the said Petition.

That, further, your Petitioner had represented that it was in the design of this most needless but fatal War to bring upon the British Empire by means of it, the gravest injury and peril by the surrender of its strength, so that it should be deprived of the use of its natural arm for its own just defence.

That this anticipation was in like manner confirmed by the so-termed 'Declaration respecting Maritime Law,' secretly signed at Paris for the suppression of the use of Privateers and of the capture of the produce and property of Belligerents embarked on the vessels of neutrals.

That from April, 1856, to the present day, no reason has been assigned by any public man for this surrender, and that no such man, either in your Honourable House or elsewhere, has spoken thereon without condemning it, and designating it as a ruinous, fatal, or suicidal measure.

 That,

That, nevertheless, no measure has been taken and no act proposed for its reversal.

That through its operation Great Britain has, during those eighteen years, been shown to be powerless as a great State, and is acknowledged to be incapable of exercising either power or influence over foreign events arising out of the ambition of the Governments whose power is exclusively territorial and military.

That France, who joined in the same Declaration, although a Military as well as a Maritime Power, has, in consequence thereof, been struck down by a Government inferior to herself in the aggregate, being absolutely destitute of naval means.

That Maritime Power consists entirely in the capture and confiscation of the goods of the enemy.

That this power, as applied to Russia, becomes, in consequence of the nature of her products and the configuration of her territory, an absolute supremacy, against which she cannot struggle and to which she must submit.

That by causing the sentiment to prevail throughout Europe, and to be acted upon, that it is not proper to capture the goods of an enemy if these goods be afloat and not on land, the control actually possessed by the Maritime Powers over the Military Powers will be changed into a control of the Military Powers over the Maritime Powers.

That these truths have been severally perceived and announced by the two men of most authority in their several branches, the late Envoy to Persia, Sir JOHN MCNEILL and Mr. RICHARD COBDEN, the first declaring that it is 'the 'Right of Search and Seizure which constitutes the Maritime 'power of England, which power he designated as a provi- 'dential weapon placed in the hand of England for the 'coercion of Russia.' The second said: 'It is clear that 'Nature itself has doomed Russia to a condition of abject 'and prostrate subjection to the will of the Maritime Powers.'

That this position has not been apprehended, by the reason that the Maritime Powers (with the sole exception formerly of the surrender of the Right of Search) have had no other will than that of Russia, seeing that the Ministers of the Crown of Russia are abler Ministers than those of the other Crowns of Europe.

That in 1780 the Government of St. Petersburg first put forward the maxims contained in the Declaration of Paris, with the avowed purpose of destroying, through their general acceptance, the power of England.

That the advantage for which an able Government has

toiled

toiled for a hundred years, must be for itself very great, as also the difficulties that it has had to encounter. So proportionately great must be the injury which it expects will be thereby inflicted on the other Governments, to circumvent whom its care has been given. At that period it succeeded in obtaining the adhesion of all the Powers to a measure without advantage to them, but nevertheless ultimately failed, through the opposition of the British Government, acting under a due sense of its duties and its rights.

That this same Government of St. Petersburg, in 1856, abstained from appearing to suggest or enforce their adoption, but really did obtain them through indirect means.

That in 1870 France might have resumed the exercise of her maritime means; in view of such a contingency the English Minister for Foreign Affairs addressed a despatch to Paris, calling on the French Government not to depart from the rules laid down in the Declaration of Paris 1856. A similar despatch was addressed to Berlin, which was without meaning, Prussia not having any maritime power to exert.

That France, if again attacked and now enlightened as to the effects of such surrender, might resume those rights.

That England might do the same. That to bar such contingency it must be and is the design of the Government of St. Petersburg to obtain such sanction for the Declaration of Paris, as shall prevent, in future contingencies, the Naval Powers from putting forth their naval strength.

That having failed, during eighteen years, to obtain such sanction through the Crowns or Parliaments of either of these countries, other means will be employed for the attainment of this end.

That this end can be attained through what is called 'Public Opinion.'

That 'Public Opinion' is to be made to believe that it is desirable, for the common good of humanity, that the property of Belligerents shall enjoy immunity when coming within reach of maritime Belligerents, in other words, 'sparing *private* property at sea.'

That this design has been brought so far towards maturity that a mixed Congress of anomalous nature has been summoned at Brussels, under the personal influence of the Emperor of RUSSIA, to determine the new laws that shall regulate the action of Belligerents.

That Representatives, not only of the different Sovereigns, but also of the various departments of the separate Governments, are to constitute this new extra-National Legislative Assembly.

That

That your Honourable House, together with the other House of Parliament, and the QUEEN, can alone alter the laws of England.

That all three cannot alter the Law of Nations in its fundamental parts, such as that of forbidding a nation to use its natural means of defence.

That the measures proposed are contrary to, and subversive of, the laws of England, as well as those of Nations and of Nature.

That the object in view is to deprive England of the power of resisting any and every unjust demand, and to repeat with impunity a further partition of France, and the infliction on her of a further ransom.

Your Petitioner therefore prays your Honourable House in your wisdom to perform the service of advice due to your allegiance to the QUEEN, by presenting a humble address warning Her Majesty of the danger of affording, by the presence of Her Representatives, any colour to such an anomalous assemblage, but instead thereof to declare null and void the Declaration of Paris of 1856.

And your Petitioner will ever pray.

DAVID URQUHART.

Carstairs House, Lanark.

FINIS.

STEPHEN AUSTIN AND SONS, PRINTERS, HERTFORD.